This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

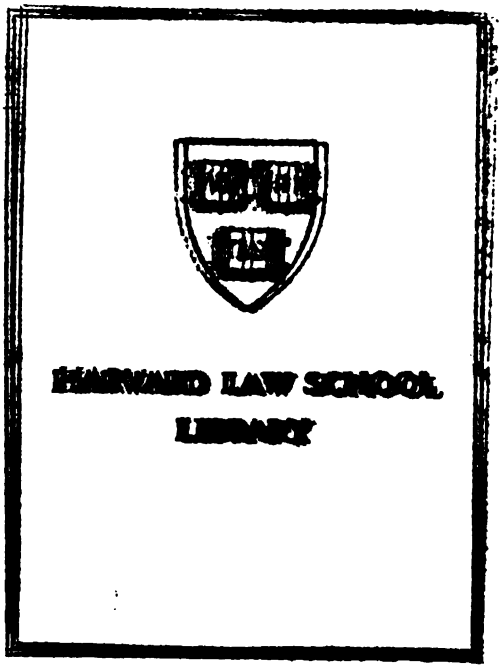
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW LIBRARY
3 2044 078 494 242


HARVARD LAW SCHOOL
LIBRARY

4	1	4	79	4	124	4	164	4	218	4	264	4	327	4	381	4	454	4	522	4	574	4	618
7	159	4	593	18	406	7	401	14	473	4	351	25	191	7	583	15	176	8	182	4	577	7	525
17	484	5	143	20	122	8	138	21	470	5	429	4	331	8	13	22	52	15	284	10	379	42	451
63	594	5	263	46	432	14	245	36	386	6	55	16	30	109	49	34	88	75	67	22	424	4	619
4	7	7	138	48	209	22	57	4	224	6	467	49	23	4	388	66	310	99	591	29	134	9	114
16	260	8	533	55	557	4	169	4	262	6	488	4	333	6	180	68	482	4	595	4	577	13	205
22	353	9	499	77	392	37	533	5	518	6	529	7	548	7	19	4	457	5	298	4	554	33	203
4	43	9	579	4	126	4	171	4	226	6	537	7	599	9	344	10	552	6	19	4	573	57	55
7	235	11	87	12	371	18	85	15	437	6	544	8	393	12	67	13	439	7	173	7	656	4	627
4	45	12	340	62	40	18	86	51	60	8	497	8	489	13	142	20	488	8	468	8	183	28	49
9	578	12	351	4	128	39	243	62	206	8	553	10	48	17	449	23	92	59	12	9	412	28	212
4	46	36	145	7	330	4	174	4	239	9	381	12	115	35	172	4	461	59	19	14	526	90	341
4	73	4	84	4	130	14	165	9	448	45	341	12	377	39	57	4	614	112	333	16	355	4	628
31	36	6	533	9	15	14	313	85	566	122	316	18	86	51	337	31	475	4	528	4	578	9	330
43	228	7	536	9	446	18	428	121	369	4	266	19	463	93	339	4	464	4	604	10	357	12	76
52	152	8	164	12	626	47	257	4	240	5	429	4	342	4	399	7	599	4	531	4	580	12	543
103	10	8	258	23	107	51	524	4	241	4	268	5	194	75	389	9	485	7	581	7	330	13	523
103	537	8	314	23	530	60	530	4	574	19	325	6	517	4	403	14	524	11	220	4	580	21	111
4	49	9	231	39	278	79	283	4	578	21	66	6	528	6	291	36	215	4	533	9	259	45	560
6	431	9	552	45	114	4	177	4	600	46	321	6	532	13	397	68	545	7	76	9	267	63	457
8	286	9	588	4	132	12	45	4	602	4	275	8	157	41	599	4	468	14	179	15	252	66	585
64	263	10	4	23	34	23	599	5	194	18	197	9	43	52	91	10	352	57	40	15	257	86	474
4	51	50	139	4	134	4	179	6	451	4	280	9	57	86	93	81	148	4	535	37	329	91	560
8	482	52	425	6	392	65	397	11	554	8	192	9	174	94	70	4	471	9	300	37	371	93	461
48	337	82	481	7	142	101	38	24	269	4	283	10	80	4	407	8	6	14	507	4	585	111	459
107	347	95	84	17	55	4	184	53	163	6	117	11	464	21	162	55	341	68	374	4	584	4	632
4	55	96	460	44	22	4	628	54	412	11	485	11	485	23	113	116	445	4	537	4	585	9	412
51	198	4	86	63	467	4	186	4	241	13	387	34	201	23	128	4	474	10	4	13	394	59	77
4	56	7	713	70	458	36	160	4	600	24	433	34	226	47	63	32	331	4	540	4	589	75	478
10	149	8	332	4	139	4	189	4	611	61	62	37	132	56	187	4	481	14	213	42	275	80	465
14	344	25	522	15	8	49	593	6	451	97	262	42	558	67	269	4	637	100	326	69	97	111	485
19	239	38	8	20	128	81	514	22	5	107	19	68	26	4	409	44	488	4	546	4	591	4	636
35	526	69	379	51	463	92	68	48	123	4	290	81	332	4	614	83	191	7	106	9	499	83	191
42	307	4	90	4	143	4	194	54	412	4	635	83	480	4	617	4	486	7	625	11	86	4	637
44	448	5	219	54	223	23	68	4	243	69	299	90	396	8	260	6	431	12	472	4	599	9	278
45	595	14	313	101	369	30	459	4	265	111	485	102	321	37	291	10	419	15	281	4	602	10	4
52	12	18	428	4	146	45	443	4	652	4	299	4	351	39	562	11	216	48	79	9	412	14	214
60	248	4	92	7	560	55	468	5	429	56	187	4	396	83	428	48	253	60	248	34	439	19	370
60	502	7	697	10	225	97	435	6	431	4	301	10	318	4	417	4	488	4	550	48	122	53	279
62	174	4	94	10	376	4	200	6	467	6	515	51	209	10	250	21	437	40	303	63	443	54	392
83	356	51	75	90	269	27	94	6	488	6	528	74	589	10	321	69	348	64	132	107	188	58	358
90	99	4	95	4	149	4	200	12	317	6	599	4	355	34	321	4	492	96	252	4	601	100	326
91	468	9	399	14	412	7	163	14	87	8	395	5	37	42	198	14	213	4	554	4	554	4	642
117	376	16	313	19	466	8	421	51	438	8	552	7	226	51	443	4	500	4	607	4	574	37	101
4	66	17	105	21	491	12	93	122	316	18	223	8	456	95	280	4	606	4	558	4	604	4	648
5	214	25	448	22	65	12	549	4	246	79	375	12	637	4	425	5	45	9	66	7	561	37	171
5	234	46	243	32	491	34	494	14	427	4	305	17	374	11	28	4	501	4	561	8	496	4	652
6	465	50	83	55	424	114	140	33	442	4	583	17	377	41	208	16	496	8	459	9	412	6	488
7	108	4	101	74	262	4	206	4	248	4	621	21	22	4	428	4	512	4	563	9	543	12	317
16	168	5	247	4	154	4	226	4	275	6	339	26	288	63	117	12	504	12	376	24	269	122	316
18	463	14	461	7	552	4	262	9	152	7	158	28	71	4	431	23	10	59	256	50	175	4	653
62	174	22	163	7	598	4	500	77	295	7	170	77	219	5	253	51	102	4	596	58	64	8	503
81	196	30	508	61	205	5	518	4	255	15	330	4	359	7	35	54	375	8	254	63	443	89	224
101	434	30	513	4	156	123	466	23	177	16	47	10	265	63	93	65	595	9	346	4	602	90	485
122	161	114	47	104	556	4	256	4	315	16	501	13	458	82	575	106	190	10	180	7	561		
4	75	117	592	4	158	12	349	4	588	4	315	39	184	4	436	4	515	10	351	9	543		
4	570	4	112	9	238	12	368	16	31	7	588	4	362	47	53	79	453	17	540	17	456		
10	285	91	83	87	94	20	198	22	138	16	31	96	141	4	438	86	116	25	33	4	603		
10	352	4	114	90	213	4	260	60	514	22	138	4	368	6	171	115	28	41	198	7	561		
11	397	4	590	94	411	26	505	96	116	60	514	10	36	52	72	4	516	71	366	9	543		
12	33	69	97	97	168	29	551	96	130	96	116	10	398	52	76	18	86	78	56	4	607		
92	593	4	117	100	73	4	261	100	530	96	130	33	531	4	442	4	519	81	308	9	412		
4	78	65	151	121	259	5	518	103	369	100	530	34	9	14	365	9	28	81	407	4	607		
100	89	66	310	4	160			4	318	103	369	45	540	33	533	10	321	104	172	8	391		
		4	120	6	383			16	266	4	318	48	546	72	448	17	33	4	572	45	482		
		102	90	21	114			16	483	16	266	93	468	4	444	35	120	4	574	51	318		
				68	91			21	435	21	435	4	374	4	494	39	62	8	139	62	582		
				91	201			51	91	51	91	47	112	9	135	79	405	4	574	4	612		
				96	141					4	321	4	377	72	118	89	91	4	573	42	14		
										4	482	22	52										
										83	191	51	444										

Copyright, 1890, by Frank Shepard, Chicago. (Patent applied for.)

INDIANA REPORTS.

VOL. IV.

Indiana. Supreme court

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

HARVARD LAW SCHOOL LIBRARY.

BEING AN OFFICIAL CONTINUATION OF BLACKFORD'S REPORTS,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ALBERT G. PORTER, A. M.,

OFFICIAL REPORTER.

VOL. IV.

INDIANAPOLIS:

AUSTIN H. BROWN, PRINTER.

1854.

Entered according to the Act of Congress, in the year one thousand eight hundred and fifty-four, by

ALBERT G. PORTER,

in the clerk's office of the District Court of the United States, within and for the Distri of Indiana.

Rec. Feb. 14 1856

2/19/85

JUDGES

OF THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ISAAC BLACKFORD, LL. D.,*
SAMUEL E. PERKINS,†
THOMAS L. SMITH,*
ANDREW DAVISON,‡
WILLIAM Z. STUART,‡
ADDISON L. ROACHE.‡

*Term of office expired on the 3d day of *January*, 1853.

†Elected by the people on the 12th of *October*, 1852—having held the office from the 21st of *January*, 1846, to the period of his election, by appointment, under the former constitution of the state.

‡Elected by the people on the 12th of *October*, 1852.

The Supreme Court consists of four judges, who are elected, under the present constitution of the state, for a period of six years, by the people.

RULES OF THE SUPREME COURT.

[ADOPTED NOVEMBER TERM, A. D. 1846.]

I. Motions may be made immediately after the orders of the preceding day are read and the opinions of the Court delivered in; but at no other time, unless in cases of necessity or in relation to a cause when called in course.

II. Motions are to be made by the counsel in the order in which their names stand on the record; but no one is to make more than one motion at a time.

III. When a motion is founded on a matter of fact which is not admitted, or apparent on the record, it must be supported by affidavit.

IV. Rehearings must be applied for during the term in which the decision is made, and by petition in writing setting forth the causes for which the judgment or decree is supposed to be erroneous. The Court will consider the petition without argument, and direct the rehearing, if granted, to one or more points, as the case may require.

V. When a cause, whether at law or in chancery, is submitted without argument, each party must furnish the Court with a written statement of the points to be relied on, signed by counsel; but when the cause is to be argued, such statement must be submitted to the Court at a convenient time before the calling of the cause.

VI. In every case brought before the Court for trial, one of the counsel for the plaintiff must open his case; he will be answered by the counsel for the defendant, who will be replied to by one of the plaintiff's counsel; and this will end all discussion.

VII. But two counsel will be allowed to argue on one side of any cause without leave of the Court, which may never be asked for except in a case of importance and difficulty.

VIII. On motions and collateral questions, but one person will be heard on either side without leave of the Court.

IX. In original cases in chancery, all extrinsic objections to depositions or other exhibits, must be made before the final hearing of the cause.

X. The clerk of this Court shall not permit the papers, in any cause, to be taken from his office or from the Court room, except by one of the judges.

XI. In appeals, the same rules shall be observed with respect to the assignment of errors as in writs of error.

XII. Supersedeas bonds may be executed in the clerk's office of the Court below, with surety to be approved of by such clerk, in a sum sufficient to include the judgment, damages and costs. If a certified copy of the bond be presented to the clerk of this Court, on application for a supersedeas or for a writ of error to operate as such, the same may be issued in the usual form. The writ may also issue, though such copy

be not presented. In that case the clerk shall indorse on the supersedeas, or on the writ of error indorsed to operate as a supersedeas, that it shall not stay the proceedings until the bond be executed as aforesaid, and an indorsement be made by the clerk below on the supersedeas, or on the writ of error, that the bond has been executed and approved of as aforesaid. And a certified copy of the bond shall be filed in the clerk's office of this Court, on or before the first day of the term next ensuing the granting of the writ.

XIII. The clerk, during the term, may deliver the transcript of a cause to the counsel of either party, on being furnished with a receipt for the same. The transcript to be returned to the office within two days, or sooner if required.

XIV. All transcripts must be delivered to the clerk at his office, and the causes be there docketed.

XV. Applications for writs of supersedeas in term time, must be made by delivering the transcript and briefs to the clerk at his office. And the clerk must deliver such transcripts and briefs to the judges at their chambers, on the evening of the day on which he receives them.

XVI. When a cause in error is called, which has been docketed more than 90 days before the term, and there is no appearance for the defendant (process not having been served 10 days nor taken out 60 days before the term), the suit shall be dismissed.

XVII. If a cause be docketed on or before the first day of the term, and, if in error, the process have been served 10 days before the term, the parties must be ready when the cause is called.

XVIII. No motion for a *certiorari* in cases of diminution of the record will be heard, unless the motion be made in writing, and state the defects to be supplied.

XIX. If, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed, or may submit it either with or without argument. If the defendant make default, the plaintiff may proceed *ex parte*.

XX. The assignment of errors shall contain the names of the parties; and process, when necessary, shall issue accordingly.

XXI. Subsequently to the present term (*Nov. T.*, 1846), the causes shall be decided by the Supreme Court in the order of time in which they have been, or shall be, submitted, cases of emergency excepted.

XXII. Appearances to suits in this Court shall be entered in the clerk's office.

XXIII. The rule as to the order of time in deciding causes does not apply to plain cases.

[ADOPTED NOVEMBER TERM, A. D. 1852.]

XXIV. Applicants for admission to the bar will be sworn as attorneys upon proof that they are voters and of good moral character.

XXV. No submission of a case will be permitted without a brief by the party sub mitting it; and, after the present term, only printed briefs will be received.

XXVI. The pages, and lines upon the pages, of transcripts, must be numbered before the cause is submitted, and the transcript mus be referred to in the briefs by page and line.

XXVII. Attorneys upon opposite sides, in each case, will be required, upon request, to interchange briefs.

XXVIII. Points not made in some of the briefs by counsel, will be considered as waived in the suit in which the briefs are filed, and may be treated by the Court accordingly.

XXIX. The volume containing any case cited in a brief, must be placed within the reach of the Court; or the opinion in the case, or such part of it as is relied on, must be accurately copied, with the statement of the facts on which it is based, and so much of the context as forms a qualification of or exception to it.

XXX. In every bill of exceptions, purporting to set out the evidence, upon motion for a new trial overruled, the words "this was all the evidence given in the cause," are to be regarded as technical, and indispensable to repel the presumption of other evidence.

It is ordered that this rule operate on all causes tried in the Circuit Courts and Courts of Common Pleas after June 1, 1853.

[ADOPTED NOVEMBER TERM, A. D. 1853.]

XXXI. Causes may be submitted without a brief during the sitting of the Court, at the Supreme Court room, in the State House; but every such submission will be set aside at the costs of the party making it, where a printed brief is not filed in the cause by the submitting party within 60 days from the date of submission.

XXXII. Prosecuting attorneys will not be required to file printed briefs in cases wherein they appear as such for the defendant.

[ADOPTED NOVEMBER TERM, A. D. 1854.]

XXXIII. All cases submitted under the rule giving leave to file a brief in 60 days shall stand dismissed, if the brief is not filed with the clerk within that time.

XXXIV. On the call of the docket at each term, every cause filed one year prior to the first day of such term and not submitted, shall be dismissed at the cost of the party bringing the case up, unless upon such call the cause be submitted on printed brief.

XXXV. The 31st Rule allowing causes to be submitted with leave to file brief in 60 days, is hereby modified so as to apply only to causes filed within 30 days prior to the first day of the term; and all causes filed more than 30 days before the first day of term can be submitted only on printed brief filed at the time of submission under the 25th Rule.

XXXVI. Causes submitted under the sixty-day Rule shall not be distributed to the judge till after the 60 days expire.

XXXVII. After submission the papers shall not be permitted to pass out of the hands of the judge to whom they are allotted; but either party may have a copy of the record, or any part of it, from the clerk, upon the payment of proper fees.

XXXVIII.—The 13th Rule is rescinded; and the clerk is directed to keep the records; to permit inspection of them in his office; or, on payment of proper fees, to furnish copies.

TABLE

OF THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.

Abbott et al. v. Smith,..... ... 452
Adams, Barker v..... 574
Adamson, Hunt v.... 108
Adams, Smith v..... 577
Allen, Watson v..... 537
Alsop, The State v..... 141
American Live Stock Insurance Co., Judah v..... 333
Ash, Wortman v..... 74

B.

Babbitt v. Doe d. Brush et al.,..... 355
Babcock, Sunman v..... 554
Bacon et al. v. Denny et al.,..... 617
Bailey, Hunt et al. v..... 630
Bailey v. Ricketts et al.,..... 488
Bainum v. Small, ... 49
Baker, Orr v. 86
Baker v. Railsback, ... 533
Bancroft et al., Hubbs et al. v..... 388
Bankus et al. v. The State,..... 114
Baramore v. The State,..... 524
Barbour et al., Duncan et al. v..... 562
Barbour et al, Owsley et al. v.... 584, 585
Bargis v. The State, ... 126
Barker v. Adams,..... 574
Barkhurst, Travis v. 171
Barkwell v. The State,..... 179
Barnes v. Doe d. Pelton,..... 132
Base, Davis et al. v..... 313
Bearss et al., Bradley v..... 186
Beatty et al., Stanley v..... 134
Beatty v. Gates,..... 154
Beers, Peet v..... 46
Beckett v. Bledsoe,..... 256
Bembridge et al. v. Stoddard,..... 587
Benton v. Shreeve et al., ... 66
Bepley v. The State,..... 264
Best v. Ellsworth,..... 261
Birt, Louden v..... 566
Blachley et al., Goodwin v..... 438
Bland et al., Perry et al. v..... 297
Bledsoe, Beckett v..... 256
Blythe v. The State,..... 525
Board of Commissioners, &c. Woollen v. 331
Board of Trustees of the Co. Seminary of Tippecanoe Co. v. Lockwood,.... 580
Board of Trustees of W. and E. Canal, The State, v..... 495
Bohan, Love v. 235
Bowers v. Headen,..... 318
Boyle et al., The State v..... 573, 607
Braden, Burton v..... 539
Bradley v. Bearss et al.,..... 186
Bragg v. Cason,..... 632
Brannenburgh, Little v..... 35
Bricker v. Hughes,..... 146
Brown, Doe d. Harlan et al. v..... 143
Brown v. Brown,..... 627
Brown, Wright et al. v..... 95
Brutton v. The State,..... 601, 602
Bryant, The State v..... 622
Buell et al., Ellsworth v..... 555
Burgess, The State v..... 606
Burnett v. Coffin,..... 218
Burns v. Kerr..... 267
Burton v. Braden,..... 539
Burton v. Cochran et al.,..... 289
Burton v. McGregor et al.,..... 550
Bush v. Seaton et al.,..... 522
Butterfield, Cooper v..... 423

C.

Carlisle et al. v. Gaskill et al.,..... 219

Carlisle et al. v. Ramsey,..... 242
Carothers et ux. v. Little et al.,..... 571
Carter v. Spencer,..... 78
Case et ux. v. Wildridge et al.,..... 51
Case v. Green,..... 526
Cason, Bragg v..... 632
Cavins, Jones v..... 305
Centreville, &c., Turnpike Co. v. Jarrett et al.,..... 213
Chauncey et al., Ireland v..... 224
Cheek et al., The State v..... 543
Chester, Maggart v..... 124
Clark et al., The State v.....315, 318
Clark et ux. v. McDonald et al.,..... 617
Clark v. The State,.....156, 268
Clifford et al. v. Smith,..... 377
Clifton v. Shannon,..... 498
Coale et al., Reed et al. v..... 283
Cochran et al., Burton v..... 289
Coe v. Smith,..... 79
Coffin, Burnett v..... 218
Coffyn, Kitchen et ux. v..... 504
Coleman et al., Verden v..... 457
Comparet et al. v. Randall,..... 55
Cones v. Vanosdol,..... 248
Conway v. The State,..... 94
Conwell et al. v. Smith,..... 359
Conwell v. Emrie,..... 209
Cook v. Noble,..... 221
Cooley v. Harper,..... 454
Coonley v. Tracy et al.,..... 137
Cooper v. Butterfield,..... 423
Cooper v. McJunkin,..... 290
Corwin v. Reddington et al., ... 198
Coult, Malin v..... 535
Cox et al. v. O'Riley et al.,..... 368
Cravens v. Kiser,..... 512
Crutz v. The State,..... 385

D.

Daubenspeck, Eastes v..... 617
Davis et al. v. Stonestreet,..... 101
Davis, The State Bank v..... 653
Davis v. Bass et al.,..... 313
Dawley v. The State,..... 128
Day, Downey v..... 531
Degant, Snyder v..... 578
Demoss, The State v..... 189
Dennis, Gillum v..... 417
Denny et al., Bacon et al. v..... 617
Detro v. The State,..... 200
Develin v. Riggsbee,..... 464
Dickerson v. Nelson et al.....160, 280
Dils, Oungst v..... 545
Dinwiddie et al., Hood et al. v..... 294
Divine v. The State,..... 240
Dodd, Priddy v..... 84
Doe d. Brush et al., Babbitt v..... 355
Doe d. Dunn et al., Hearick et al. v.... 164
Doe d. Harlan et al. v. Brown,..... 143
Doe d. McDonald, Graham v..... 615
Doe d. Murphy et al. v. Hayes et al.,.. 117
Doe d. Pearson, Montgomery et al. v... 266
Doe d. Pelton, Barnes v..... 132
Doe d. Pidgeon v. Richards,..... 374
Doe d. Studebaker, Markley v..... 262
Doe d. Wentworth et al. v. Goodwin,.. 508
Donohue, Strange et al. v..... 327
Downey v. Day,..... 531
Druley, Stevenson et ux. v..... ... 519
Duncan et al. v. Barbour et al.,..... 562
Dunlap v. Jones, ... 641
Dunn, The State v..... 280
Dunn v. The State,..... 529
Durham v. Hudson,..... 501

E.

Eastes v. Daubenspeck,..... 617
Edmonds, Weed et al. v..... 468
Egbert, Palmer, v..... 65
Egbert v. The State,..... 399
Ellis et al. v. The State et al.,..... 1
Ellis v. Hubbard,..... 206
Ellsworth, Best v..... 261
Ellsworth v. Buell et al.,..... 555
Elmer, McLane et al. v..... 239
Emrie, Conwell v..... 209
Ennis v. Vantrees,..... 341
Ewell, Sherry v..... 652

F.

Fairman v. Farmer et al.,..... 436
Farmer et al., Fairman v..... 436
Fimple, The State v..... 622
Fisher v. The State,..... 409
Folsom, Hooker et al. v..... 90
Forbes v. Tiffany et al.,..... 204
Foster et ux., Philbrick v..... 442
Foster v. Mabes,..... 614

G.

Gardner v. The State,..... 632
Gaskill et al., Carlisle et al. v..... 219
Gates, Beatty v..... 154
Gillum v. Dennis,..... 417
Goodwin, Doe d. Wentworth et al. v... 508
Goodwin v. Blachley et al.,..... 438
Graham v. Doe d. McDonald,..... 615
Green, Case v..... 526

H.

Hall et al., Nash et al. v..... 444
Hall, Henline v..... 189
Halliday et al., The Terre Haute Drawbridge Co. v..... 36
Hand et al. v. Taylor,..... 409
Hannah v. Henderson,..... 174
Harbor v. Morgan,..... 158
Hare v. The State,..... 241
Harper, Cooley v..... 454
Harper, Rankin v..... 585
Harper v. Neal,..... 479
Harris v. Stanton,..... 120
Hartman v. Kendall et ux.,..... 403
Hawkins, The White Water, &c., Canal Co. v..... 474

Hayes et al., Doe d. Murphy et al. v.... 117
Headen, Bowers v..... 318
Hearick et al. v. Doe d. Dunn et al. ... 164
Helton, Rees v..... 273
Henderson, Hannah v..... 174
Henline v. Hall,..... 189
Hetfield, Swift et al. v..... 623
Hill v. The State,..... 112
Holtsclaw v. The State,..... 597
Hood et al. v. Dinwiddie et al.,..... 294
Hooker et al. v. Folsom,..... 90
Hooks v. York et al.,..... 636
Hotchkiss et al. v. Jones,..... 260
Houston v. Houston,..... 139
Howard et al., Rogers et al. v..... 325
Hoyt, Reece v..... 169
Hubbard, Ellis v..... 206
Hubbs et al. v. Bancroft et al.,..... 388
Hudson, Durham v..... 501
Hughes, Bricker v..... 146
Hughes v. McClelland et al.,..... 92
Hull v. Kirkpatrick,..... 637
Humphries, Keck v..... 492
Humphries, Sibert v..... 481
Hunt et al. v. Bailey,..... 630
Hunt v. Adamson,..... 108
Hunt v. Lewis,..... 174
Hurley, The State v..... 574
Hussey v. McGilpin,..... 593

I.

Ireland v. Chauncey et al.,..... 224

J.

Jackson v. The State,..... 560
Jamison v. Jarrett,..... 187
Jarboe v. Kepler,..... 177
Jarrett et al., The Centreville, &c., Turnpike Co. v..... 213
Jarrett, Jamison v..... 187
Jelly v. Stevens,..... 510
Jones, Dunlap v..... 641
Jones, Hotchkiss et al. v..... 260
Jones, Loveland et al. v..... 184
Jones v. Cavins,..... 305
Judah v. The American Live-Stock Insurance Co..... 333

K.

Keck v. Humphries,..... 492
Keefer v. The State,..... 246
Kelley v. Mason,..... 618
Kendall et ux., Hartman v..... 403
Kepler, Jarboe v..... 177
Kerr, Burns v..... 267
Kiger, The State v..... 621
Kimball, The Unknown Heirs of Whitney v..... 546
Kingsbury et al. v. Vance,..... 178
Kirkpatrick, Hull v..... 637
Kiser, Cravens v..... 512
Kitchen et ux. v. Coffyn,..... 504
Kratz v. The State,..... 647

L.

Lagow, Neilson et al. v..... 607
Lane et al., The State v..... 163
Laney et al., Laney v..... 149
Laney v. Laney et al.,..... 149
Langsdale, The Madison, &c., Railroad Co. v..... 197
Lanning, Lawrence v..... 194
Law et al. v. Smith et al.,..... 56
Lawrence v. Lanning,..... 194
Laws et al., Starr v..... 192
Leach v. Leach,..... 628
Ledley v. The State,..... 580
Lemon v. The State,..... 603
Lewadag v. The State,..... 611
Lewark, The Shelbyville, &c., Railroad Co. v..... 471
Lewis, Hunt v..... 174
Lines et al., The State v..... 351
Little et al., Carothers et ux. v..... 571
Little v. Brannenburgh,..... 35
Lockstand, The State v.....554, 572
Lockwood, The Board of Trustees of the Co. Seminary of Tippecanoe Co. v. 580
Lostutter, The Madison Insurance Co. v. 558
Louden v. Birt,..... 566
Louderback v. Rosengrant,..... 563
Loveland et al. v. Jones,..... 184
Love v. Bohan,..... 235
Lynch, The Shelbyville, &c., Railroad Co. v..... 494

M.

Mabes, Foster v..... 614
Macy et al., The State Bank et al. v. .. 36
Madison Insurance Co. v. Lostutter,... 558
Madison, &c., Railroad Co. v. Langsdale,..... 197
Maggart v. Chester,..... 194
Maize v. The State,..... 342
Major et al. v. McLester,..... 591
Malin v. Coult,..... 535
Markley v. Doe d. Studebaker,..... 262
Marshall, Miley v..... 211
Mason, Kelley v..... 618
Maxwell, Rogers v..... 243
McCarty et al. v. Pruett,..... 226
McClelland et al., Hughes v..... 92
McCoskry et al., Rush v..... 588
McDonald et al., Clark et ux. v..... 617
McDonald et al., Graham v..... 615
McDonald et al., Worthington v..... 483
McGilpin, Hussey v..... 593
McGinley, The State v..... 7
McGregor et al., Burton v..... 551
McJunkin, Cooper v..... 290
McLane et al. v. Elmer,..... 239
McLester, Major et al. v..... 591
McManus, the Rushville, &c., Railroad Co. v..... 275
Miles, The State v..... 577
Miley v. Marshall,..... 211
Mitchel v. Whitcomb,..... 614

Mix v. Smith,. 499
Montgomery et al. v. Doe d. Pearson,.. 266
Morgan, Harbor v..... 158
Morrow et al., Slevin et al. v..... 425
Mosteller, Stackberger v..... 461
Muirhead v. Snyder,..... 486
Murnan, Weston v..... 271

N.

Nash et al. v. Hall et al.,..... 444
Neal et al. v. Pressell et al.,..... 594
Neal, Harper v..... 479
Neilson et al. v. Lagow,..... 607
Nelson et al., Dickerson v.....160, 280
Noble, Cook v..... 221
Nolan, The State v..... 508
Nossaman et al. v. Nossaman, ... 648
Nossaman, Nossaman et al. v..... 648
Null et al. v. The White Water, &c., Canal Co.,..... 431

O.

O'Conner, The State v..... 299
O'Riley et al., Cox et al. v..... 368
Orr v. Baker,..... 86
Orth et al. v. Sharkey,..... 642
Osborn et al. v. The State,..... 620
Osthimer, Schwartz v..... 109
Oungst v. Dils,..... 545
Owsley et al. v. Barbour et al.,....584, 585

P.

Palmer v. Egbert,..... 65
Palmer, Watts et al. v..... 575
Parent, Troutner et al. v..... 232
Payton v. Secur,..... 645
Peelman et al., Peelman v..... 612
Peelman v. Peelman et al.,..... 612
Peet v. Beers,..... 46
Perkins v. The State,..... 222
Perry et al. v. Bland et al.,..... 297
Phelps v. Younger,..... 450
Philbrick v. Foster et ux.,..... 442
Phipps, The State v..... 515
Polleys et al. v. Swope, ... 217
Porter et al. v. Utter,..... 200
Pressell et al., Neal et al. v..... 594
Priddy v. Dodd,..... 84
Pruett, McCarty et al. v..... 226
Puett et al. v. The State Bank,..... 45

R.

Railsback, Baker v..... 533
Ramsey, Carlisle et al. v..... 242
Randall, Comparet et al. v..... 55
Rankin v. Harper,..... 585
Reddington et al., Corwin v..... 198
Reece v. Hoyt,..... 169
Reed et al. v. Coale et al.,..... 283
Reynolds v. Rochester,..... 43
Reynolds v. Stevenson,..... 619
Richards, Doe d. Pidgeon v..... 374
Ricketts et al., Bailey v..... 488
Riggsbee, Develin v..... 464
Rochester, Reynolds v..... 43
Rogers et al. v. Howard et al.,..... 325
Rogers v. Maxwell,..... 243
Rosenbaum v. The State,..... 599
Rosengrant, Louderback v..... 563
Ross, The State v..... 541
Ross v. Helton,..... 273
Rushville, &c., Railroad Co. v. McManus,..... 275
Rush v. McCoskry et al.,..... 588
Rust v. The State,..... 528

S.

Schooley et al. v. Stoops et al.,..... 130
Schwartz v. Osthimer,..... 109
Scott, Wort v..... 580
Seaton et al., Bush v..... 522
Secur, Payton v.. 645
Shannon, Clifton v..... 498
Shannon, The State v..... 431
Sharkey, Orth et al. v..... 642
Shaw, The State v..... 428
Shaw v. The State,..... 553
Shelbyville, &c., Railroad Co. v. Lewark,..... 471
Shelbyville, &c., Railroad Co. v. Lynch. 494
Sherm, The State v..... 508
Sherry v. Ewell, ... 652
Shoemaker, The State v..... 100
Shreeve et al., Benton v..... 66
Shufflebarger, The State v..... 532
Sibert v. Humphries,..... 481
Slevin et al. v. Morrow et al.,..... 425
Small, Bainum v..... 49
Smith, Abbott et al. v..... 452
Smith, Clifford et al. v..... 377
Smith, Coe v..... 79
Smith, Conwell et al. v..... 359
Smith et al., Law et al. v..... 56
Smith, Mix v..... 499
Smith v. Adams,..... 577
Smith v. The State,..... 500
Snyder, Muirhead v..... 486
Snyder v. Degant,..... 578
Speakman et al. v. Speakman et al.,... 420
Spencer, Carter v..... 78
Stackberger v. Mostoller,..... 461
Stanley v. Beatty et al.,..... 134
Stanton, Harris v..... 120
Starr v. Laws et al.,..... 192
State Bank et al. v. Macy et al.,..... 362
State Bank, Puett et al. v..... 45
State, Bankus et al. v..... 114
State Bank v. Davis,..... 653
State Bank, Young et al. v.....301, 304
State, Baramore v..... 524
State, Bargis v..... 126
State, Barkwell v..... 179
State, Bepley v..... 264
State, Blythe v..... 525

State, Brutton v.....601, 602
State, Clark v.....156, 268
State, Conway v..... 94
State, Crutz v..... 385
State, Dawley v..... 128
State, Detro v..... 200
State, Divine v..... 240
State, Dunn v..... 529
State, Egbert v..... 399
State et al., Ellis et al. v..... 1
State, Fisher v. 409
State, Gardner v..... 632
State, Hare v..... 241
State, Hill v..... 112
State, Holtzclaw v..... 597
State, Jackson v..... 560
State, Keefer v..... 246
State, Krutz v..... 647
State, Ledley v..... 580
State, Lemon v..... 603
State, Lewadag v..... 611
State, Maize v..... 342
State, Osborn et al. v..... 620
State, Perkins v..... 222
State, Rosenbaum v..... 599
State, Rust v..... 528
State, Shaw v..... 553
State, Smith v..... 500
State, Steele v..... 561
State, Stewart et al. v..... 396
State, Sumpter v..... 605
State, Swails v..... 516
State, Taylor v..... 540
State v. Alsop,..... 141
State v. Boyle et al.,.....573, 607
State v. Bryant,..... 622
State v. Burgess,..... 606
State v. Cheek et al.,..... 543
State v. Clark et al.,.....315, 318
State v. Demoss,..... 189
State v. Dunn,..... 280
State v. Fimple,..... 622
State v. Hurley,..... 574
State v. Kiger,..... 621
State v. Lane et al.,..... 163
State v. Lines et al., ... 351
State v. Lockstand..... .....554, 572
State v. McGinley,..... 7
State v. Miles,..... 577
State v. Nolan,..... 508
State v. O'Conner, ... 299
State v. Phipps,..... 515
State v. Ross,..... 541
State v. Shannon,..... 431
State v. Shaw,..... 428
State v. Sherm,..... 508
State v. Shoemaker,..... 100
State v. Shufflebarger,..... 532
State, v. The Board of Trustees of the W. and E. Canal,..... 495
State v. Thompson,..... 623
State v. Voshall et al.,..... 589
State v. Warner..... 604
State v. Watson,..... 595
State v. Williams, ...234, 393
State v. Wingate,..... 193
State v. Winton et al.,..... 321
State v. Young,..... 508
State v. Yount,..... 653
State, Willard v..... 407
Steele v. The State,..... 561
Stevens, Jelly v..... 510
Stevenson et ux. v. Druley,..... 519
Stevenson, Reynolds v..... 619
Stewart et al. v. The State,..... 396
Stoddard, Bembridge et al. v. 587
Stonestreet, Davis et al. v..... 101
Stoops et al., Schooley et al. v..... 130
Strange et al. v. Donohue,..... 327
Sumpter v. The State,..... 605
Sunman v. Babcock,..... 554
Swails v. The State,..... 516
Swift et al. v. Hetfield, ... 623
Swope, Polleys et al. v..... 217

T.

Taylor et al., Ex Parte,..... 479
Taylor, Hand et al. v..... 409
Taylor v. The State,..... 540
Terre Haute Drawbridge Co. v. Halliday et al.,..... 36
Thompson, The State v..... 623
Tiffany et al., Forbes v..... 204
Tracy et al., Coonley v..... 137
Travis v. Barkhurst,..... 171
Troutner et al. v. Parent,..... 231
Tucker, Wendover et al. v..... 381

U.

Unknown Heirs of Whitney v. Kimball, 546
Utter, Porter et al. v..... .. 200

V.

Vance, Kingsbury et al. v..... 178
Vanosdol, Cones v..... 248
Vantrees, Ennis v..... 341
Verden v. Coleman et al.,..... 457
Voshall et al., The State v..... 589

W.

Walton, Ward v..... 75
Ward v. Walton,..... 75
Warner, The State v..... 604
Watson, The State v..... 595
Watson v. Allen,..... 537
Watts et al. v. Palmer,..... 575
Weed et al. v. Edmonds,..... 468
Wendover et al. v. Tucker,..... 381
Weston v. Murnan,..... 271
Whitcomb, Mitchel v..... 614
White Water, &c., Canal Co., Null et al. v..... 431
White Water, &c., Canal Co. v. Hawkins,..... 474

Whitney, The Unknown heirs of, v. Kimball,..... 546
Wildridge et al., Case et ux. v..... 51
Willard v. The State,..... 407
Williams, The State v.....234, 393
Wingate, The State v..... 192
Winton et al. v. The State,..... 321
Wolfe v. Wolfe,..... 255
Woollen v. The Board of Commissioners, &c.,..... 331
Worthington v. McDonald et al., ... 483
Wortman v. Ash,..... 74
Wort v. Scott,..... 580
Wright et al. v. Brown,..... 95

Y.

York et al., Hooks v..... 636
Younger, Phelps v..... 45
Young et al. v. The State Bank,...301, 304
Young, The State v..... 508
Yount, The State v..... 653

PREVIOUS DECISIONS

OF THE

SUPREME COURT OF THIS STATE,

OVERRULED IN THIS VOLUME.

De Camp *v.* **Stevens**, 4 Blackf. 24.

A. contracted to work a year for *B.*, at a certain sum per month; but after working three months and ten days, left the employment of *B.* and sued him for the value of the work done. It was *held*, that *A.* not having continued to work for *B.* during the entire term, could not maintain an action.

The doctrine above stated is overruled in *Coe* v. *Smith*, Administrator, 79.

Sinard *v.* **Patterson**, 3 Blackf. 353.

A plea of payment can not be supported, unless the payment has been made in money.

Overruled in *Louden* v. *Birt*, 566.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1852, IN THE THIRTY-SIXTH YEAR OF THE STATE, BUT HELD OVER ON PETITIONS FOR REHEARING, WHICH HAVE BEEN OVERRULED.

4 1
129 302

Ellis and Another *v.* The State and Another.

It is competent for the legislature to make the state printer an officer.

The law of 1843 made the right to do the state printing and take the compensation therefor, an office.

The office of state printer is one of trust and profit.

The sale of the office of state printer is prohibited by principles of public policy.

The act of 1851, entitled "An act in relation to the pay of *Austin H. Brown*, printer to the constitutional convention of *Indiana*," does not sanction the assignment of the office of state printer made by *Jacob P. Chapman*, state printer, to *Ellis* and *Spann*.

The printing done for the constitutional convention of 1850, was not embraced in any contract, express or implied, between the state printer and the legislature that elected him.

No contract could be implied, on the part of the legislature, with the state printer, further than that he should execute the printing authorized by a legislature acting under the same constitution with that which elected him.

By public printing is meant that which is directly ordered by the legislature, or performed for the agents of the state government authorized to procure it to be done.

Nov. Term, 1852.

ELLIS v. THE STATE.

The printing executed by *Austin H. Brown* for the constitutional convention of 1850, was not authorized by a legislature acting under the constitution of 1816, nor by any legislature; nor did any authorized agent of the legislature procure it to be done.

The printing done for the constitutional convention of 1850, was procured by the convention to be done on its own responsibility; and the subsequent payment for it by a legislature sitting under the authority of the constitution of 1851, was a voluntary and not an obligatory act; and the state was not rendered liable for damages to the state printer thereby.

Friday, November 26, 1852.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Bill in chancery in the *Marion* Circuit Court, by *Ellis* and *Spann*, assignees of *Jacob P. Chapman*, state printer, to recover damages which, as such assignees, they alleged they had sustained by reason of the printing of the late constitutional convention having been withheld from them.

The bill charged that on the 3d day of *January*, 1850, *Jacob P. Chapman* was elected state printer, to serve for three years next after the 1st day of *August*, 1850; that he gave bond on the 5th day of *January*, 1850, as required by law; that on the 3d day of *May*, 1850, *Ellis* and *Spann* purchased from *Chapman* the right to do the public printing and receive the pay therefor, for which they paid him a considerable sum of money; that on the 16th day of *May*, 1850, *Chapman* made to them a power of attorney to receive the pay for said printing, and received from them a bond conditioned for its faithful execution; that the convention to amend the constitution of the state assembled at *Indianapolis* on the 7th day of *October*, 1850, and adjourned finally on the 13th day of *February*, 1851, and, during its session, ordered and procured *Austin H. Brown* to execute printing, consisting of the journal and debates of said convention, and other matters, costing in all, at legal prices, the sum of 6,110 dollars and 89 cents, and the net profit on which amounted to 2,976 dollars and 67 cents, being the sum claimed in this suit by *Ellis* and *Spann* as their measure of damages. The bill further alleged the readiness of *Chapman* and of *Ellis* and *Spann* to do said printing, and notice to the

convention of the fact. The bill set forth the act of the legislature of the 8th of *February*, 1851, authorizing the treasurer of state to pay *Brown* for said printing out of the state treasury, &c., but providing that said payment should not "operate against the claim of *Jacob P. Chapman*, the state printer, or his assignee or assignees, if any he or they have, against the state." The second section of said act enacts, "That *Erastus W. H. Ellis* and *John S. Spann*, the assignees of *Jacob P. Chapman*, the state printer of the State of *Indiana*, be and they are hereby authorized to bring suit against the State of *Indiana*, in the *Marion* Circuit Court, in accordance with the provisions of chapter 45 of the general laws of 1850, page 66, for such damages, if any, as they may have sustained in consequence of the printing of the constitutional convention being withheld from them."

Chapman was made a defendant and answered, confessing the bill.

The state answered, mainly confessing the facts of the bill, but denying the right of the plaintiffs to damages upon the facts.

The Court below decreed against the plaintiffs.

The counsel for the plaintiffs contend that this decree should be reversed and this suit sustained:

1st. Because the state printer is not an officer, and the business or function of the state printer is not an office, but rather an engagement with the state for the performance of service, which engagement is legally assignable. Or,

2d. If the state printer be an officer, and his duties be not generally assignable, still the state has recognized and sanctioned the assignment, in the present case, by the act authorizing this suit.

3d. That the printing done by *Brown* for the constitutional convention was embraced in the contract between the state printer and the legislature that elected him.

It was competent for the legislature to make the state printer an officer, and we think they have done so in this state. Art. 5, of chap. 4, of the R. S. 1843, p. 100, treats

Nov. Term, 1852.

Ellis v. The State.

"of the officers elected by the general assembly, and the tenure of their offices." It specifies:

"1st. The Secretary of State.

"2d. The Treasurer of State.

"3d. The Auditor of State.

"4th. President Judges of the Circuit Courts.

"5th. Prosecuting Attorneys.

"6th. The State Librarian and State Printer."

Section 34 enacts that "the state printer shall hold his office for the term of three years, and until his successor is chosen and qualified;" and section 77, of the same chapter, provides that "every person chosen or appointed to any office of trust or profit under the authority of this state, is required, before entering on the duties of said office, to take an oath," &c. The state printer is also required to give bond for the faithful performance of his duties. The law, then, has made the right to do the state printing and take the compensation therefor, an office, and it is one of profit and trust. That it is one of profit, the institution of this suit sufficiently evidences. It is also one of trust. The printing for the term for which the state printer is elected amounts to a large sum of money, and creates the necessity for a large amount of materials. The state wants, therefore, honesty and judgment in the man intrusted with it; and she wants promptness, accuracy, and neatness, in the execution of the work. And it is with an eye to these things that the officer is chosen, and his personal superintendence is expected to be given to secure them. We may mention that in all the contracts in this state letting portions of the public works to the several contractors, a provision prohibiting the sub-letting at will of the contract, was inserted; and also one making the failure of the contractor to give his personal superintendence to the work a ground of forfeiture of the contract. The statutes of 5 and 6 Edw. 6 of *England*, against buying and selling offices, would prohibit the sale of that of state printer, and principles of public policy prohibit it here.

Nor do we think the act authorizing this suit has sanc-

tioned the assignment supposed to have been made in this case. The legislature have not assumed to determine anything in the premises, but have referred all the questions arising in the cause, that of the assignment among them, to the Courts for decision.

Nor, thirdly, do we think the printing done for the late constitutional convention was embraced in any contract, express or implied, between Mr. *Chapman*, as state printer, and the legislature that elected him. We do not mean to admit or deny that his election constituted a contract for any amount of printing. See *Gilbert* v. *The Board of Commissioners*, &c., 8 Blackf. 81, and 3 Kent's Comm., 6 ed., p. 454, n. (c). At all events, no contract could be implied on the part of the legislature by his election, further than that he should execute the printing authorized by a legislature acting under the same constitution as was that which elected him. The legislature did not guarantee against a change of government; and had the convention abrogated the office of state printer, and provided that the public printing should thereafter be let out to the lowest bidder, the then incumbent of that place would have shared the fate of the other officers whose terms were shortened, or offices abolished altogether.

And by public printing, we may remark, we mean such as is directly ordered by the legislature, or performed for the agents of the government authorized to procure it to be done. The printing in question, executed by *Brown*, was not authorized by a legislature acting under the old constitution, nor by any legislature. We have carefully looked over the act of 1850, (L. of 1850, p. 29), providing for the convention, and authorizing payment of certain expenses which it might incur, and there is nowhere a sentence in said act by which the officers under the old constitution could be justified in paying for said printing, nor by which said convention could order said printing at the expense of the state. It was not, therefore, either authorized by the legislature directly, nor procured by her authorized agent.

Nov. Term, 1852.

ELLIS v. THE STATE.

We are aware that a difference of opinion exists as to the powers of the late constitutional convention. By some it is regarded as having been a mere creature of the legislature of the old organization, called to perform a specific duty, viz., the amending and reforming of the old constitution. By others it is regarded as having been a body outside of, independent of, and over and above the old political organization; and in this latter light, we believe, it regarded itself. But it is immaterial to the decision of the case before us, in which of these lights it is viewed. If it was the mere agent of the old government for effecting its reformation, then it was limited in its powers by the letter of agency—the statute—under which it assembled; and that did not authorize it to procure from any source the printing in controversy. If it was a body independent of the old organization, then the former government had nothing to do with its printing bills, and they were to be provided for by a subsequent legislature.

We think the printing in relation to which this suit was instituted, was procured by the convention on its own responsibility, and that the subsequent payment for it by a legislature under the old constitution was a voluntary, not an obligatory act, and that the state was not thereby subjected to the payment of damages to her printer. To illustrate: Suppose a property-holder of this city, who practices building more or less each year, to make a contract with a mechanic to do all his work in that line for a period of time; suppose him to designate to the mechanic, from time to time, buildings for him to erect, and all that said proprietor procures or wishes to be erected by any one; that in the meantime, some person, without the knowledge or consent of said proprietor, procures some other mechanic to erect, on ground of said proprietor, a building which he had no desire or intention to have placed upon it, but which he should subsequently conclude, as a mere free and liberal act, to pay for; that the mechanic in the employ of said proprietor then sues him for damages on account of said last-mentioned building: would

not said proprietor reply to said mechanic, "I have adhered to my contract with you, have given you all the building I have procured to be done, or that I wished or you expected, when employed, should be done. I have in no manner injured you by voluntarily paying for this extra matter not desired by me." Like this, in principle, seems to us the case under consideration; and if an individual would not be liable to damages under such circumstances, still less, we think, would the state in the case before us.

It may be proper to observe that the call of the convention impliedly, perhaps, bound the legislature to pay for such printing as was necessary, if any was, to the accomplishment of the purpose for which the convention was declared in the law to be called, viz., the amending of the then constitution of the state. Beyond this, at all events, no printing was authorized, and, to this extent, if the legislature was legally bound to give her state printer all her public printing, said printer might have reason to complain. Of the printing in question, however, but little if any could be regarded as necessary.

It is the unanimous opinion of the Court that the decree below must be affirmed.

Per Curiam.—The decree is affirmed with costs.

J. Morrison, *S. Major*, and *J. A. Liston*, for the appellants.

D. Wallace, *L. Barbour*, and *A. G. Porter*, for the state.

THE STATE *v.* McGINLEY.

The act of 1848 authorizing a reference of the claim of *Patrick McGinley* against the state to three disinterested persons, to be appointed by the governor, enacted that two of such persons should be men of legal attainments, &c. *Held*, that the act was merely directory to the governor, and that his action in the premises could not be reviewed.

Nov. Term, 1852.

THE STATE v. MCGINLEY.

That act made it the duty of the Supreme Court, on an appeal from the award of the arbitrators, to examine the case upon its merits.

The legislature, by authorizing an appeal to the Supreme Court from the award of the arbitrators, intended that said Court should be governed by the rules of law applicable to ordinary suits.

By the contract between *McGinley* and the state, the engineer, in case *McGinley* should fail to comply with his contract, might declare it forfeited and null; the state might withhold 10 per cent. of the work performed; and might relet the job to another. The engineer made the declaration; and *McGinley* brought suit, alleging that the declaration was wrongly made. *Held*, that the proof of the allegation devolved upon him.

A member of the board of public works could not, under the internal improvement act of 1836, approve or disapprove of a contractor's work.

The contract between *McGinley* and the state, after prescribing what things should be done and omitted by the engineer or his assistant, provided that the contractor was in all things to follow the directions of the engineer or his assistant. *Held*, that he was only authorized to follow the engineer or his assistant in those things wherein they had a right to direct him.

Friday, December 24.

APPEAL from the *Floyd* Circuit Court.

PERKINS, J.—This was a proceeding instituted by *McGinley*, under a special statute, to recover damages from the state for an alleged breach of contract. The case is as follows:

On the 1st of *March*, 1837, the state of *Indiana*, by *David H. Maxwell*, one of the commissioners of public works, entered into a contract with *Patrick McGinley* for the building by said *McGinley* of a stone bridge over *Silver* creek, on the line of the *Jeffersonville* and *Crawfordsville* road. In the contract *McGinley* agreed to build said bridge in a substantial and workmanlike manner, "at the rate of 7 dollars and 75 cents per perch of twenty-five cubic feet, all excavations for foundations included in the above price, and the bridge to be built according to the plan furnished by the principal or resident engineer on said road." The payments were to be upon monthly estimates, ten per cent. being withheld as a forfeit, should the contractor fail in fulfilling his agreement. It was also stipulated that should *McGinley* refuse at any time to conform to the directions and instructions of the engineer, or in any manner violate the contract, the engineer

should have power to declare the contract forfeited, &c. And further, that in case of any difference arising between the parties as to the construction of the agreement, the decision of the engineer should be final in the premises. No particular specifications as to the manner in which the work was to be done appear to have been furnished in writing at the letting, but Mr. *Pettit*, the chief engineer, says that it was to be executed like that of the *Wills* creek bridge on the *Cumberland* road, which he thus describes: "The masonry in the abutments rock-work, the beds and joints of all the stone in the face of the work being cut to regular surfaces. The backing is composed of stones having parallel beds and tops, of which not more than two should be used to equal the front stone in the height, and no stones were admitted of less than two cubic feet in contents, except the spalls necessary to fill interstices. The whole was laid in mortar made of sand and lime. Headers were used in front of the abutments, and in the whole work. Their average length was probably about four feet, although many were more. The distance between the headers varied from seven to twelve feet, depending in a measure on the kind of stone used for ashler. No stone was admitted having more height than bed." Mr. *Pettit* further states, that at the time of the letting said *Silver* creek bridge, he described to *McGinley* the character of the work, so that he understood it, and referred him "to the bridge across *Wills* creek as exhibiting the character of the masonry required in the *Silver* creek bridge, which reference was made to enable him to bid understandingly." *Jesse L. Williams*, who subsequently became chief engineer, also states that *McGinley* informed him that the work was to conform to that of the *Wills* creek bridge. This evidence does not appear to have been objected to, and was probably legally admissible; but the case is clearly made out, as will hereafter be seen, independently of it, in favor of the state.

McGinley commenced working upon his job. He was subsequently arrested in his operations by the following declaration:

Nov. Term, 1852.

THE STATE v. MCGINLEY.

"Whereas, on the 5th of *October* last, the contractor for the *Silver* creek bridge was directed by the principal engineer to take down certain portions of the masonry on account of its imperfect character, and whereas the contractor refused to follow such directions, but continued his operations, covering up the defective work; therefore, in performance of my duty to the state, and by virtue of authority vested in the engineer by the terms of this agreement, I hereby declare the within contract forfeited, null, and void. *Dec.* 11th, 1837. *R. H. Fauntleroy*, resident engineer on the *Jeffersonville* and *Crawfordsville* road."

The plan of the bridge was then changed, a wooden structure instead of a stone arch being placed upon the abutments. This was done, say some of the witnesses, on account of the defective character of the masonry in the abutments so far as laid by *McGinley*, a wooden structure being lighter than an arch of stone.

The completion of the stone work was relet to *Moulton* and company at the rate of 10 dollars per perch.

The amount paid to *McGinley* while prosecuting the work was 21,814 dollars. He afterwards presented a claim to the board of internal improvement for a further allowance, and they rejected it.

In 1839, the legislature, by a joint resolution, authorized *McGinley* to sue the state on his alleged claim, and the suit was prosecuted in the *Floyd* Circuit Court. That Court gave him a judgment for 13,500 dollars. The case was appealed to the Supreme Court, where judgment was rendered against *McGinley* for costs, the Court holding him entitled to no further compensation, nor to damages, on his contract. In 1848, an act was passed by the legislature authorizing his claim to be heard in *Floyd* county, by arbitrators appointed by the governor. The appointments were made by governor *Dunning*, the cause heard, and said arbitrators awarded to *McGinley* the sum formerly adjudged to him by the *Floyd* Circuit Court, together with interest during the intervening time, making in all 21,143 dollars. The award was filed in the clerk's

office of *Floyd* county, and an appeal taken therefrom to this Court.

The bill alleges that *McGinley* did not fail in the fulfillment of his contract, and that the state, therefore, wrongfully declared it forfeited. It further alleges that he had performed extra work, and had lost on the sale of his tools, shanties, &c.

The answer denies the material allegations in the bill.

Proofs were introduced.

Before going into the evidence, however, a couple of preliminary questions must be settled.

The act of 1848, under which this suit was instituted, required, in section 4, that "two of the persons to be appointed [as arbitrators] by the governor, under the provisions of the first section of this act, shall be men of legal attainments, and before," &c.

A plea in abatement was filed at the meeting of the arbitrators, averring that no two of them were men of legal attainments. The plea was demurred to and the demurrer sustained.

We think this decision was right. The statute requires no particular degree of legal attainments in the arbitrators, and almost every man in this country possesses some. The statute points to no test by which the question could be decided. It does not say the arbitrators should be judges, licensed lawyers, justices of the peace, or men of any particular class. Suppose issue had been taken on the plea and evidence introduced, what would have been the rule of decision? From the indefiniteness of the act in this particular, we think it was merely directory to the governor, and that his action in the premises could not be reviewed in the proceedings.

The remaining preliminary question relates to the power of this Court over the case.

The statute referring the case to arbitration gives an appeal to the Supreme Court, and provides, in section 10, that said Court may set aside the award for misconduct, &c., in the arbitrators; and in section 11 that the Court may modify it for certain causes; and, in section

Nov. Term, 1852.

THE STATE v. MCGINLEY.

12, that "if said case shall be taken to the Supreme Court, said Court may fully examine into the merits of the same, and decide it according to law and justice." The last section gives the Court unlimited power over the cause, and the previous ones do not expressly limit it. We have concluded that it is our duty to examine the case upon its merits. And we may properly remark, that in doing so, we shall be governed by the rules of law applicable to ordinary suits in courts of justice, and that if any amount of money is awarded to *McGinley*, it will be because he is legally entitled to it. Had the legislature intended that he should have it upon any other ground, they would not have referred his cause to a legal tribunal, but have voted the amount they wished him to have directly from the state treasury.

The contract between *McGinley* and the state provided that if he failed in complying with the terms of said contract, the engineer might declare it forfeited and null, the state might withhold ten per cent. of the amount of work performed under the contract, and relet the job to another. The engineer did make such declaration. *McGinley* brings this suit, alleging that such declaration was wrongfully made, and the proof of the allegation devolves upon him. The first question, therefore, is, has *McGinley* shown that he complied with his contract in building the abutments of said *Silver* creek bridge, so far as he progressed with them? If he has not, he has shown no ground for recovering damages for the breach of the contract, none for recovering expenses of preparation or losses from sale of tools, &c. Twelve witnesses have testified to this point. Eight of them, *Jesse L. Williams*, *Lazarus B. Wilson*, *John Frazier*, *Peter Martineau*, *Charles G. Voorhies*, *D. Lapham*, *W. H. Price*, and *C. A. Ogden*, all engineers of character, unequivocally condemn *McGinley's* work, and say it was not in accordance with his contract; that it was not done in a workmanlike manner, without reference to the *Wills* creek bridge as a standard of comparison. Many defects are pointed out. It was not well grouted, had not sufficient headers, the backing was not

properly laid, the joints were too open, &c., &c. *Williams* had personally examined the work and taken up portions of it. *Voorhies* had inspected its surface. *Martineau* had examined it. *Frazier* says when he examined it he inserted his hand and riding switch in the joints of the exterior face of the walls. These men could not, therefore, be mistaken. Four of the witnesses, *David Hearsum*, *J. Lutz*, *L. B. Stoughton*, and *L. D. Coburn*, do not condemn *McGinley's* work. *Hearsum*, assistant resident engineer, who was discharged from the service of the state for incompetency, states that the work and materials were entirely good and sufficient. *Coburn*, a mason who worked on the bridge, thinks it "was reasonably well done"—well enough for the place the bridge occupied. *Lutz* and *Stoughton*, *Kentucky* engineers, think the work well enough executed for a bridge across so small a stream; they think mortar and grout were unnecessary. *Lutz* says—"In regard to the defects of the work I must observe that they would only show themselves if the plan of the bridge contained a smaller amount of materials; in that case, a greater number of tiers and more accuracy in the backing would have been required." Other witnesses testify to the good quality of the materials used by *McGinley*.

It is impossible upon this evidence to say that *McGinley* had complied with his contract in executing the masonry of the abutments for the *Silver* creek bridge, and that the engineer erred in declaring it forfeited. The evidence is decisive to the contrary. It is said that there are discrepancies in the testimony; but we discover none that weaken its force upon this point. It is also said that the work has stood some fourteen years, and that that is evidence for *McGinley*. That does not prove that it was done according to contract, nor that it will stand as long as it would were it so done. It is also to be remembered that a wooden structure was finally placed upon that work instead of a stone arch, as was at first contemplated. But the position is taken that as the work of *McGinley* was sanctioned as it progressed, by *Hearsum*, assistant resident

Nov. Term, 1852.

THE STATE v. MCGINLEY.

engineer, and by *Maxwell*, one of the board of internal improvement, the state is now estopped to dispute that the work conforms to the contract. To this position we cannot assent. The general management of the internal improvement system of *Indiana* was committed by law to a board of internal improvement. That board was not composed of engineers or artisans of any kind. The board was empowered to appoint a chief and the necessary subordinate engineers, to whom the oversight of the construction of the works was committed, and to some of whom in each case was entrusted the power of declaring the contract for the construction of that particular work forfeited for non-compliance with the contract. This mere statement shows that the member of the board of public works was not the person to approve or disapprove of the contractor's work. And as to the engineer, his power was subordinate to the contract. That was the controlling authority. We understand the matter in this way: The state makes a contract with an individual for the construction of a bridge in a good workmanlike manner, and sometimes with the further stipulation that the work shall be of a kind and of materials named in certain specifications, or, as in this case, contained in a model referred to as a standing specification at the making of the contract. Now, the contractor is presumed and bound to know himself the character of the work required by his contract, and how to do it; and he is bound to do it rightly. But, as his work, when the job is complete, will much of it be concealed from inspection, an engineer remains with the contractor, not to discharge him from the fulfillment of his contract, but to see that the work, as it progresses, is all done according to the contract. But it is said the contractor is in all things to follow the directions of the engineer or his assistant. He is, in all things wherein the engineer or assistant has a right to direct him. For instance, the contract provides that he shall dismiss disorderly hands when directed by the engineer or assistant. He shall not employ hands from other jobs when so directed. He would be bound to increase his force in order

to secure the completion of his job in time, when so directed, &c.; and so in cases of doubt as to the meaning of the contract. But if the engineer should tell the contractor to build his abutments of mud, when the contract required him to build them of stone, we think he would not be bound nor have a right to follow such a direction, for it would not be a direction the engineer would have power to give; and an attempt to dispense with the contract and accept defective work would indicate a fraudulent collusion between the engineer and contractor for the purpose of cheating the state. Nor did *McGinley* understand that the sanction of the assistant engineer protected him; for when, on the 5th of *October*, *Williams*, the chief engineer, directed him to suspend his work on account of the defective character of that he was performing, he did not answer that it was approved by *Hearsum*, the assistant resident engineer, though such was the fact, but went to *Kentucky* to obtain engineers who would say the work fulfilled his contract. But even if the principal or resident engineer would have such power, the assistant resident engineer would not, for he is not authorized by the contract to furnish a plan of the work, or to accept it when done. These things are to be done by the principal or resident engineer, by the express terms of the contract. While specifying some things, the contract speaks of the *assistant* resident engineer as having power to perform them; but in that part of the contract relative to accepting the work, &c., the word assistant is dropped, as it would seem, *ex industria*. Were the doctrine contended for by *McGinley's* counsel correct, a contract would be an idle and useless thing. But conceding, for the sake of the argument, that the state was bound by *Hearsum's* approval while he was acting in the absence of the resident and chief engineer, and that the contractor was bound to obey in all things the direction of the engineer, still it will not help the case for *McGinley;* for when *Williams*, the chief engineer, arrived to inspect the work, on the 5th of *October*, his authority was

Nov. Term, 1852.

THE STATE v. McGINLEY.

paramount to and superseded *Hearsum's*, and *Williams* then condemned the work and ordered *McGinley* to suspend, &c., yet *McGinley* disobeyed the order and direction of the engineer, and proceeded with the work in a manner, so far as the testimony shows, no better than he had been doing before; and this very conduct is made the ground of declaring the contract forfeited by *Fauntleroy*, the resident engineer, as appears by his declaration copied into the forepart of this opinion.

McGinley, then, having failed in complying with his agreement, and the same having been rightly declared forfeited, he can at best be entitled only to compensation for the work done and materials furnished by him towards the bridge, less ten per cent. as a forfeit.

He has been paid 21,814 dollars, and must have done work and furnished materials to entitle him to that sum, in round numbers, to the value of 24,300 dollars.

Five witnesses may be said to have made estimates of his work and materials. Most of said witnesses also estimate the quantity of materials and cost of work for the whole bridge, and doubtless make both too low; but this does not affect their estimates of the work actually done and materials furnished by *McGinley*. In their estimates of quantities for the whole bridge, they are too low in the expensive as well as in the cheap work, and as *McGinley* was paid by the perch for the whole, be it more or less, it does not impair the correctness of their calculations of what he had done which could be accurately measured, and in the quantity of which the witnesses do not greatly vary, the difference in their results being mostly produced by the difference in opinion as to the relative value, as it is termed. And we must necessarily be governed by the preponderance of the evidence upon these points, as well as upon others. We cannot go and measure and estimate ourselves. And could we measure the work and determine its quantity, we still should have to depend upon witnesses of skill in the matter, to determine its relative value as compared with equal quantities

of work in other parts of the job, such being the rule in estimating work upon contracts of this character. *McGinley* claims for—

1. Extra excavation on the change of plan of bridge;

2. Extra excavation for the foundation of the abutments on the first plan, and artificial foundation;

3. For masonry and materials in the abutments.

In regard to the first item, the evidence furnishes no data for calculating any amount; and *Hearsum* tells us that at the change, which consisted in setting the foundation some further back, one hundred and sixteen perches of stone had been laid, which, on being relaid, were re-estimated to *McGinley* both in materials and work. We presume paying him for the materials twice was considered a sufficient compensation for the additional excavation.

For the second of the above items *Hearsum* allows him 4,500 dollars.

The third is the principal one. As we have remarked, five witnesses have testified in regard to it. *Wilson* makes this item 19,539 dollars. *Voorhies* makes it 17,385 dollars. *Martineau* makes it 13,027 dollars.

This third witness states that his estimate is upon accurate measurement of all the work and materials done and furnished by *McGinley*. Now if we add to either of the above sums the 4,500 dollars for extra excavation and artificial foundation, the amount will still be below the 24,300 dollars to which *McGinley's* work should amount, to entitle him to the sum he has already received.

Hearsum's estimate, exclusive of the 4,500 dollars, is 26,728 dollars. Without specifying all his objections, *Williams* makes *Hearsum's* estimate about 8,000 dollars too high, on account of his placing an erroneous relative value upon the part of the job done. *Hearsum* also was but an assistant resident engineer, and was discharged from the service of the state for incompetency. His estimate, therefore, cannot be entitled to greater confidence, at all events, than those of the other witnesses. He states also that he estimated to *McGinley* the timbers (grillage),

Nov. Term, 1852.

THE STATE v. MCGINLEY.

in the artificial foundation, as so much masonry, and that he also includes the value of said foundation in his allowance of 4,500 dollars extra. He would seem to have given the price of that foundation to *McGinley* twice. It measures, as masonry, two hundred and twenty-two perches: But allow the estimates of the five witnesses to stand at the sums they have fixed, putting that of *Jesse L. Williams* at 18,728 dollars, 8,000 less than *Hearsum's*, and take the mean of those estimates, and the result is but 18,753 dollars; to which add the 4,500 extra, and the sum is still over 1,000 dollars below the amount that *McGinley* should have done upon the job to justify him in retaining the sum he has received.

It should also be remembered that one hundred and seventy perches of stone were laid by *McGinley* after he was ordered to stop by the principal engineer; that three hundred and thirty perches of his work were taken down at an expense of over 500 dollars to the state, and, of course, relaid; and that the officers deemed it necessary to change the plan of the bridge to a wooden structure on account of the defective character of *McGinley's* work. In view of all these things, we do not see that in this case the application of the law works any injustice to *McGinley*.

SMITH, J.—Having been unable to agree to the decision made by the majority of the Court in this case, I shall be obliged, in order to give a clear exposition of my views, to set out the facts proved at considerable length.

On the 1st of *March*, 1837, *Patrick McGinley* entered into a written contract with the state, represented by *David Maxwell*, acting commissioner of the *Jeffersonville* and *Crawfordsville* road, to build, in a substantial and workmanlike manner, a stone bridge over *Silver* creek, on the line of said road. The bridge was to be built according to a plan to be furnished by the principal or resident engineer on said road, and to be paid for at the rate of 7 dollars and 75 cents per perch of twenty-five cubic feet. The contract contained these further stipulations, "that

if, in the opinion of the engineer, the party of the second part should unreasonably neglect to prosecute, with a force proportionate to the quantity of work to be done and the period in which it is to be completed, or shall sub-contract or relet said work, or shall not give personal superintendence to the work, or shall refuse at any time to conform to the directions and instructions of the engineer or assistant engineer, or shall fail to dismiss any disorderly, quarrelsome, or disobedient person as aforesaid, or shall violate in any way or manner any of the stipulations, provisions, or conditions of this contract, the engineer shall have power to declare this contract forfeited and null and void, and on his declaration the same shall cease and determine forever, and the said party of the first part may proceed to relet the same; and in case of such declaration of forfeiture, the said state of *Indiana* is to retain the per centage herein before mentioned, [being ten per cent. retained on the periodical estimates] on the whole amount of said work done at that time, forever, as compensation for damages, which it is hereby agreed by the parties thereto that the said state of *Indiana* shall be entitled to, in consequence of the failure of the party of the second part to perform the stipulations of this contract." It was also agreed by the parties, "that in case any difference should at any time arise between the parties hereto as to the construction of this contract, and the true intent and meaning thereof, that such difference shall be considered and decided by the said engineer; and the said parties do hereby submit all and singular the premises to his award, arbitrament, and decision, and agree that the same shall be final and conclusive between them, to all intents and purposes."

Under this contract *McGinley* commenced to build a bridge at the point designated, and continued his operations until the 5th of *October*, 1837. At the time of the letting, the water in the creek was too high to admit an examination of its bed, but from a partial examination the engineers supposed the bed of the creek consisted of

Nov. Term, 1852.

THE STATE v. McGINLEY.

solid rock, and so represented it to *McGinley*. It was afterwards found, however, that the bed of the creek was an aluminous slate, and that the abutments would require expensive artificial foundations. Upon this discovery, *McGinley* refused to proceed with the work without compensation for the extra expense of the foundations, and he was then assured by the agents of the state that such extra expense would be allowed him.

McGinley was first furnished with a plan for a bridge with two spans of fifty feet each, with a pier in the middle, and he had laid one abutment about four feet high, when the plan was changed so as to have but one span of eighty feet, by which change the work done became useless and was removed. This change in the plan occasioned further additional expense to the contractor, by causing such a delay of the work that he was not able to get it out of the way of a flood which afterwards occurred and filled the excavations for the foundations. He however commenced building the abutments and wing-walls according to the new plan furnished by the engineers, and had, at the date last mentioned, laid about two thousand perches of masonry, and had transported to the site of the bridge a large quantity of stone and other materials which had not yet been put into the walls. He had also incurred heavy expenses in opening several quarries in *Kentucky* and in this state, in making roads, in providing shanties, teams, boats, cranes, and other apparatus necessary for the completion of such a contract.

The work was done under the superintendence of *David Hearsum*, who had been duly appointed acting resident engineer to take charge of it, and continued to hold that office from the 1st of *March*, 1837, until *February*, 1838. *Henry M. Pettit* was the principal engineer of the state until about the 1st of *August*, 1837. *Robert H. Fauntleroy* was the principal assistant engineer on the line of the *Jeffersonville* and *Crawfordsville* road. During the period that *McGinley* was prosecuting his work, Mr. *Fauntleroy* visited it but two or three times. Mr. *Pettit*

visited it occasionally during the time he was in the service of the state, and Mr. *Maxwell*, the acting commissioner, visited it monthly.

Mr. *Hearsum* visited the work daily. He inspected all the materials, directed and inspected the cutting of the stone to the proper size and shape, and gave directions as to the manner in which they should be laid. He states in his deposition that the walls were well built, that there were sufficient headers inserted in the structure in a manner approved by him, that there was no part of a course without headers, that no part of the masonry was laid without mortar, that the whole interior of wall was grouted in each course according to his directions, that every part of the work was done according to his instructions, to his entire approbation, and that the work was so done throughout that the bond was not only good but excellent.

At the time Mr. *Pettit* left the service of the state, the foundations of the abutments were laid, and a large quantity of materials had been furnished for the walls. He also states that as far as the work had progressed, it was done to his entire satisfaction, and that the materials provided were excellent. Mr. *Fauntleroy*, on being asked if the directions given to *McGinley* had been followed by him, only says that he was informed by Mr. *Hearsum* that *McGinley* had performed all that was required of him.

No complaint of the work done by *McGinley* appears to have been made until the 5th of *October*, 1837. On that day Mr. *Williams* first visited the bridge and spent part of a day in examining it. He had been appointed principal engineer of the state in charge of the works in progress during the previous month of *September*. He states that he found the masonry defective and wholly unsuited to sustain a stone arch of so great a span. The prominent defects pointed out by him were, that the abutments had been built without front headers, that many of the face stones were too narrow, that the bed joints were too open, that many of the backing stones were too small, and that the cavities between the stones were not suffi-

Nov. Term, 1852.

THE STATE v. McGINLEY.

ciently filled with grout or mortar. In consequence of finding these defects, he told *McGinley* it was his duty to require the work to be suspended, a part of it taken down, and an entire change in its character effected.

The substance of this direction he afterwards embodied in the following letter which he handed to *McGinley* in *Louisville* on the next day, as he was about leaving for another part of the state.

"*New Albany*, *Oct.* 5th, 1837: *Patrick McGinley*, contractor, &c.: Sir—In discharge of the duties with which I have recently been charged by the board of internal improvements, I have to-day examined for the first time the masonry in the abutments of *Silver* creek bridge. I find the work to be of a very imperfect character, both in material and workmanship, and wholly unsuited to sustain an arch of so great a span. It therefore becomes my duty to direct an immediate suspension of the work. The greater part, if not the whole, of the masonry now laid must be removed, and other and better stone prepared before the work can be recommenced. And as the season for laying masonry is now nearly past, the work cannot be resumed until next spring. I regret very much the delay as well as the expense to the contractor which this decision will cause, but cannot do otherwise. The duty is imperative. An arch of this magnitude could not be sustained by abutments formed of such masonry. Respectfully, *J. L. Williams*, prin. engineer."

McGinley did not suspend the work as required by this letter, but continued working until about the 25th of *October*, when he finally suspended the work by the order of *Hearsum*, who continued to be the resident engineer, and who had been directed to give this order by Mr. *Fauntleroy*. During the period which intervened between the date of the letter of Mr. *Williams* and his final suspension, he had added about one hundred and seventy perches to the abutments.

Mr. *Williams* revisited the work in the month of *December*, and finding that *McGinley* had not suspended the work according to his previous direction, the following

notice was served upon him by his order, and indorsed upon the contract:

"Whereas, on the 5th of *October*, the contractor for the *Silver* creek bridge was directed by the principal engineer to take down certain portions of the masonry, on account of its imperfect character, and whereas the contractor refused to follow such directions, but continued his operations, covering up the defective work; therefore, in performance of my duty to the state, and by virtue of authority vested in the engineer by the terms of this agreement, I hereby declare the within contract forfeited, null and void. *Dec.* 11th, 1837. *R. H. Fauntleroy*, resident engineer *Jeffersonville* and *Crawfordsville* road."

After this declaration of forfeiture the work was relet to other contractors, who under the direction of Mr. *Martineau*, who had succeeded Mr. *Hearsum* as resident engineer, took down three hundred and thirty perches of the masonry laid by *McGinley*, and then proceeded to finish the structure.

McGinley had received in payment for the work done by him 21,814 dollars. Soon after the work was finally suspended, namely, on the 11th of *November*, 1837, *Hearsum*, who was still the engineer in charge of the work, made an estimate of the work done and materials furnished which amounted to 26,374 dollars and 72 cents. This estimate he says was based upon a fair calculation of the relative value of the work done in proportion to the whole. It does not include the cost of the artificial foundations, which he estimates at 4,500 dollars, nor the cost of removing the part of the abutment which had been built before the plan was changed, nor any allowance for expenses in making preparation for the work.

The witnesses who testified on behalf of the state as to the value of the work done, differ from *Hearsum* widely in their estimates of the number of perches that would have been contained in the whole work when complete, and of the relative value of that part of it done by *McGinley*. The dimensions of the bridge according to the last plan furnished *McGinley*, were as follows:

Nov. Term, 1852.

THE STATE v. McGINLEY.

The abutments were twenty-four feet by thirty-six feet at the base, with a square offset of one foot at every six feet in height. The wing-walls were thirty-six feet by fourteen feet, with a square offset as before. The abutments and wing-walls were straight in front, battered one half inch to the foot rise on the sides to the chord line. Height of abutments and wing-walls sixty-two feet six inches. Height of parapet walls five feet. Chord of arch eighty feet. Versed sine thirty feet. Thickness of crown of arch five feet. The arch stone three feet six inches deep at the chord line, and tapering to two feet nine inches at the crown. The haunches of the arch were to be loaded with dead weight. There were also buttresses, the dimensions of which are not given.

Hearsum calculates the whole contents of the structure at nine thousand two hundred and twenty-nine perches. *Martineau* estimates the whole number of perches at seven thousand one hundred and nine and one half, and his calculations are evidently erroneous in several important particulars. The error here made is also carried into the calculations of all the other witnesses, for they all base their estimates upon the data furnished by *Martineau* as to the dimensions of the different parts of the work, none of them having seen the plan.

The first and most important question, however, that occurs in considering this case upon its merits is, whether the evidence shows that *McGinley* had failed in the performance of the stipulations of his contract in such manner that it was justly forfeited in consequence of his default. As I differ from the majority of the Court upon this point, I do not think it necessary to examine any of the subordinate questions, or the question relating to the jurisdiction of this Court, though I do not think the latter is free from doubt.

If the complainant had forfeited his contract by his own fault, it may be that he has received as much as he was strictly entitled to; but if he had not, I think there can be no doubt that he has been greatly injured and has incurred heavy losses for which he ought to be compen-

sated. I shall therefore confine myself to the examination of this point.

The majority of the Court arrive at the conclusion that *McGinley* had forfeited his contract upon one of three grounds: first, because it was a part of the contract that the work should be done in a similar manner to that of the *Wills* creek bridge on the *Cumberland* road, and it was not so done; or, secondly, because he did not do his work in a workmanlike manner, in accordance with his contract; or, thirdly, that his disobedience of the directions given him by Mr. *Williams* on the 5th of *October*, 1837, justified the engineer in declaring his contract forfeited.

The only evidence upon which the first of these grounds can be supported is as follows: Mr. *Pettit* says that at the time of the letting he referred *McGinley* to the bridge across *Wills* creek, as exhibiting the character of the masonry that would be required on the *Silver* creek bridge, to enable him to bid understandingly; and Mr. *Williams* says he heard *McGinley* say that Mr. *Pettit*, at the time of the letting, referred him to the *Wills* creek bridge, on the *National* road, and told him that the masonry of the *Silver* creek bridge would be of a similar character.

Giving the fullest effect to this evidence, I cannot agree that the representations thus made should be considered as forming a part of the contract. They were made before any contract was entered into, and before it was known that any contract would be made. They seem to have been made simply to inform *McGinley* of the general nature of the contract that would be required of him if his bid should be accepted, and would no doubt have justified him in refusing to enter into a contract even after his bid had been accepted, had one differing from those representations been required of him, if he did not choose to accept it. But if he was willing to enter into a contract varying from such representations, it would not be any the less binding.

The contract actually entered into was not that the bridge should be built like the *Wills* creek bridge, but according to a plan to be furnished by the engineer, and

Nov. Term, 1852.

THE STATE v. MCGINLEY.

that in executing or carrying out this plan he should conform to the directions of the engineer in charge of the work. I think it could hardly be contended, when a plan was furnished, and directions as to the manner of executing it were given him by the engineer, he would have been justified in refusing to conform to such plan or directions, on the ground that the *Wills* creek bridge was constructed differently, or that such representations made to him prior to his entering into the contract would have afforded him any excuse for such disobedience. There is no principle of law better settled than that parol agreements, even when made contemporaneously, cannot be permitted to vary or enlarge the stipulations of a written contract.

If he had been deceived, indeed, by such previous representations in relation to what would be required of him under a power of direction which the other party retained, he might, even after the contract was entered into, when required to incur greater expense than he had thus been led to expect, have made such deception a ground for rescinding the contract and refusing to perform it, but he would certainly have had no right to persist in constructing the bridge according to such representations and not according to the directions given him.

This may be exemplified by what occurred in relation to the foundations. The engineers had represented to *McGinley* that the bed of the creek afforded a solid foundation for the abutments, but upon commencing the work it was found that it did not, and that artificial foundations would be required. These artificial foundations added considerably to the expense, and *McGinley* refused to proceed until it was agreed that he should be paid for them as extra work. But it did not occur to him that he had any right to disobey the instructions of the engineers, and build the abutments without artificial foundations, because the *Wills* creek bridge had none. The contract provided that he should do the work as he was directed, and if he was led to make such a contract by deceptive representations, he might refuse to perform it, but if he went on

with the work, he would, notwithstanding, be bound to do it as the contract required.

It is in evidence that, after the contract was made, a plan was furnished *McGinley* giving the outlines and dimensions of the structure he was required to erect, and that he commenced his work accordingly. It appears to be the general custom in undertakings of this kind for the engineers to furnish not only the outlines of the plan, but also specifications or directions in writing, specifying minutely the kind of materials to be used, and the particular mode and manner in which each part of the work is to be constructed. I understand, however, that such specifications are but subordinate parts of the general plan, for they would of course vary with the nature of the plan adopted.

In this case no such specifications were furnished *McGinley*, though he repeatedly demanded them. *Hearsum* says *McGinley* frequently asked him for such specifications, and he applied to Mr. *Pettit* for them. *Fauntleroy* also says *McGinley* demanded specifications of him, and he wrote urgently to Mr. *Pettit* to have them furnished. Mr. *Pettit* says he directed *Fauntleroy* to make out the specifications. For some reason they were not furnished, but neither *McGinley* nor any of the engineers seem to have had any idea that the workmanship of the *Wills* creek bridge was to serve as standing specifications, agreed upon at the time of entering into the contract. As I have before observed, the representations relative to the *Wills* creek bridge had been made before the contract was entered into, but even at the time of the contract no plan was furnished, and I suppose it was not possible for engineers to imagine a contract had been made for the specifications by which a plan for a bridge was to be carried out, before the plan itself had been determined upon.

No doubt one reason why neither the plan nor specifications were specified in the contract, was the considertion that circumstances might require changes of the plan as the work progressed, and consequently changes of the

Nov. Term, 1852.

THE STATE v. McGINLEY.

specifications, and this may have been one cause why specifications were not afterward furnished. When some progress had been made with one abutment, the plan was changed from two arches of fifty feet span to one arch of eighty feet span, and it is not unreasonable to suppose that the contract was purposely drawn in the manner it was drawn, to give the engineers the power to make such changes as they should deem necessary, and to bind the contractor to do the work according to any plan and according to any directions they should think proper to give him.

For the above reasons, I am of opinion that the contract in evidence imports that *McGinley* was to build the bridge in question according to a plan to be furnished by the engineers, and to be governed in the execution of the work by the directions of the engineers, and that the evidence relative to the *Wills* creek bridge ought not to have any influence upon the decision of the questions arising as to his compliance with the terms of his contract.

The evidence relative to the workmanship of *McGinley* is contradictory. *Hearsum* says the work was done in precise accordance with his own instructions, and that it was in all respects sufficient and suitable for the plan which had been furnished. *Pettit* also says the work was done to his entire satisfaction, so far as it had progressed during his continuance in office, and that the materials furnished by *McGinley* were not only good but excellent. *Fauntleroy* gives no opinion as to the workmanship, but says so far as he was informed, *McGinley* had obeyed all the instructions given him.

Mr. *Staughton*, a bridge-builder by profession, and well acquainted with heavy masonry, having constructed many large bridges, says he was at this bridge and examined it frequently while in progress, and at the time the subsequent contractor was taking down a portion of it; that the rock used by *McGinley* were of sufficient size and good quality; that the work was well done and the masonry amply sufficient; that the backing stone used by the contractor were larger and better than those used by the subsequent contractor; that the work was well grout-

ed, and when a portion of the masonry was taken down, he thought it a pity to remove such work.

Mr. *Lutz*, a civil engineer of respectability and standing, says he had seen the work several times, and in *October*, 1837, gave it a thorough examination. He considered the materials used to be of the best quality and the workmanship sufficiently good, in fact stronger than the plan required. Mr. *Lutz* says, in regard to the defects of the work, "I must observe that they would only show themselves if the plan of the bridge contained a smaller amount of materials; in that case a greater number of tiers and more accuracy in the backing would have been required; but, under existing circumstances, regarding the plan of the bridge, I consider the workmanship amply sufficient to answer the desired end; indeed, I think that more work was done than was necessary for its durability and strength." I do not understand that Mr. *Lutz* here means to say that such defects as had been spoken of would have been more difficult to discover, but merely that a smaller structure would require greater accuracy of workmanship, and that what would be defects in a smaller structure would not be in one of the size of the *Silver* creek bridge.

Mr. *Coburn*, a mason who was employed by the subsequent contractors to superintend the taking down of such part of *McGinley's* work as was removed, says the work taken down was reasonably well done, and sufficiently so for the purpose for which it was intended. He also says that all of the stone taken down might have been relaid in the wall, and was relaid, with the exception of about five perches, with the knowledge of Mr. *Martineau*, who was then the resident engineer, and who visited the work every day. He says further, that the part of the work not taken down was well done, and he did not think it would ever give way.

Dr. *Whitman* says that soon after the work was reported to have been suspended, he was at the bridge and found Mr. *Maxwell* there examining it; that Mr. *Maxwell* said he thought there was not sufficient cause for the work

Nov. Term, 1852.

THE STATE v. McGINLEY.

being stopped; and he and the witness then examined the masonry thoroughly, and especially to see if there was any opening in any joint in the face of it into which a man's hand could be thrust, and they could find none such, and none where the joints of the work opened to a greater width than the thickness of the blade of a large pocket-knife.

In addition to this testimony, there was evidence before the commissioners in *October*, 1849, that the work done by *McGinley* was then standing, unimpaired by time during the lapse of about twelve years, while the work done by the subsequent contractors was much injured, and some of it would have fallen if it had not been supported by strong iron rods.

It is true the design of having a stone arch was abandoned and a wooden superstructure substituted, but Mr. *Williams* says that the principal reason for making this change was an apprehension that there might be a settling of the artificial foundations. He explains that the abutments might settle several inches without doing any material injury to a wooden superstructure, because the frame could be righted up, while a yielding of only half an inch would be fatal to a stone arch, and would inevitably cause its destruction. Besides, several of the engineers say that an abutment sixty-two feet high, strong enough to support the embankment resting against it, would be amply sufficient to support a stone arch.

On the other hand, there are several witnesses who testify that, in their opinion, the work was not sufficiently well done to sustain the heavy arch that was to be placed upon it. Of these Messrs. *Williams* and *Martineau* had examined the work personally. Mr. *Voorhees* says he had only seen the exterior or face of the work laid by *McGinley*, and he thought a portion of it was not done in a workmanlike manner, some of the stone being thicker than others in the same course, which caused the joints to be more open than they should be and prevented the bearing being equal and uniform. Mr. *Wilson* says simply that he had seen the work, and the character of the

masonry laid was not such as he would have been willing to receive in a structure of the kind. Mr. *Fraser* was not examined as a witness. The expression of his mentioned in the opinion of the majority of the Court, is taken from a letter addressed by him to Mr. *Williams* shortly after the work had been suspended. Neither Major *Ogden*, Mr. *Lapham*, or Mr. *Price* had seen the work at all. Their opinions are founded wholly on representations of the character of the work furnished them by Messrs. *Williams* and *Martineau*.

I shall not, however, express any opinion in reference to the preponderance of this evidence as to the sufficiency of the workmanship, as, in the view I shall take of it, such an opinion is not necessary. If *McGinley* performed the work in the precise manner in which he was directed to perform it by the engineers authorized to give him directions, and there was no fraudulent collusion between him and them, I cannot perceive upon what ground he can be made responsible for such defects in the plan or construction as would render the work insufficient for the purpose for which it was designed.

That he did perform the work according to the directions given him by the engineers who were authorized to furnish him with plans and directions, up to the 5th of *October*, 1837, when Mr. *Williams* first visited the bridge, is indisputable. The only engineers from whom he had received any directions previous to that time, were Mr. *Pettit*, Mr. *Fauntleroy*, and Mr. *Hearsum*. Mr. *Pettit* was the engineer in chief, Mr. *Fauntleroy* the resident engineer for the line of road on which the bridge in question was located, and Mr. *Hearsum* an assistant engineer duly appointed to act as resident engineer *pro tem.*, as Mr. *Fauntleroy* was absent in a distant part of the state. In his capacity of resident engineer *pro tem.*, Mr. *Hearsum* visited the work every day, and, as stated by Mr. *Pettit* in his deposition, had the work under his entire control, and had all the powers of the resident engineer. He gave *McGinley* all the instructions he received, and as Mr. *Pettit* and Mr. *Fauntleroy* occasionally visited the work, it must be

Nov. Term, 1852.

THE STATE v. McGINLEY.

presumed that *Hearsum* was himself governed, so far as was proper, by their directions to him, especially as neither of them testify that their instructions were in any respect disobeyed.

In the opinion of the majority of the Court it is said that *Hearsum* was only authorized to see that the contract was duly performed, and that he had no authority to give directions for the construction of the work differently from the specifications contracted for. That is no doubt true; but I think I have shown that no plan and no specifications were agreed upon in the contract, but that, in lieu of such plan and specifications, the agreement was that the work should be executed according to the directions of the engineers. This provision was no doubt intended to give the engineers a greater control over the contractor than they would have otherwise had, and enable them from time to time to make such changes in their plans, specifications, or directions, as circumstances might require. The authority to give instructions as to the manner in which the workmanship was to be performed was, therefore, expressly reserved in the contract.

It is true, in superintending such a contract, an engineer might give directions so manifestly improper as to show a fraudulent collusion with the contractor; but there can be no ground for any such supposition in this case. There is at least sufficient testimony to show that there was much difference of opinion, among persons skilled in such matters, as to whether the work was or was not sufficiently well done, and to rebut any presumption of fraudulent collusion arising solely from the fact that it was done according to *Hearsum's* directions.

Mr. *Pettit* says in his deposition, speaking of the artificial foundation, that the permanency of a foundation is to be judged of only by the engineer under whose instruction it is made, and, though defective, if approved of by the engineer, the defect cannot be laid to the charge of the contractor. The same principle must also be applicable to the abutments and other parts of a bridge, under a contract like the present. It certainly was not the duty

or the right of the contractor to determine what plan or what manner of executing a plan would be sufficient to sustain an arch of eighty feet span, but to execute the plan to be furnished him in such manner as he was directed. If he has done this, he has in all respects complied with his contract.

The principal defects found by Mr. *Williams* in the work executed by *McGinley*, were in the size of the stone used and the manner of dressing and laying them. *Hearsum* testifies in the most positive manner, that he himself personally superintended the dressing and laying of all the stone, that he gave directions as to the size, and that every part of the work was done in exact accordance with his directions. If, therefore, there were defects in the workmanship, they are to be attributed to his improper directions and not to the fault of *McGinley*.

Some stress is laid upon the fact that *Hearsum* was dismissed from the service of the state for incompetency. It is but justice to him, however, to state that there is no proof of his incompetency except the opinion of Mr. *Williams*, derived from the manner in which he had fulfilled his duties in superintending the construction of this bridge; and that he had performed those duties competently is supported at least by a respectable array of witnesses, who testify that the bridge was well constructed. But, however that may be, if *Hearsum* was incompetent, that was not the fault of *McGinley*. The state had undertaken to give him directions by competent engineers, and it was not for him to judge of their qualifications. If he had contracted to build a good and sufficient bridge, and had been left to furnish his own plan and specifications, the case would have been different. But as he contracted to build according to the plan and specifications to be furnished by engineers appointed by the state, he ought not to be held responsible for the sufficiency of the specifications of a plan any more than for the sufficiency of the plan itself. The permanency of such a structure would depend upon a variety of circumstances—as the dimensions of the abutments, the dimensions and direc-

tion of the wing-walls, the nature and quality of the materials used, and the particular manner in which those materials were put together so as to give to the whole structure a durable and sufficient bond. Each and all of such matters, it appears to me, fall within the province of the engineer to determine, and not the contractor, in cases like the present, and, therefore, I cannot agree that a sufficient cause has been shown for declaring the contract forfeited, previous to the 5th of *October*, 1837.

There still remains the question, Did the refusal of *McGinley* to conform to the directions given him by Mr. *Williams* on the 5th of *October*, justify the declaration of abandonment made on the 11th of *December* following? That declaration recites as the cause of declaring the contract forfeited, that the contractor had refused to obey the directions of the engineer to take down certain portions of the work on account of its defective character. This, however, is not exactly in accordance with the facts. There is no proof that Mr. *Williams* gave *McGinley* directions to take down any portion of the work. He informed him verbally, and in his letter of the 5th of *October*, that the greater part or the whole would have to be taken down, but gave him no directions but to suspend all work until the next spring.

McGinley then stood in this position: He had performed work to the amount of from 20,000 to 26,000 dollars, in part performance of his contract, and is suddenly informed that he must suspend the performance of the remainder for an indefinite period, and that the greater part, if not the whole, of what had been done must be taken down and rebuilt in a different manner, at his expense. Certainly he could not be required to do this, if the work he had done was done in strict accordance with his agreement.

Perhaps Mr. *Williams* had authority to order the work to be suspended indefinitely, or even to be finally abandoned, if he thought it would be unfit for the purposes for which it was designed, and it appears that this was in fact done, by the orders of Mr. *Fauntleroy*, on the 25th of

October, more than a month before the contract was declared forfeited. But this would be equivalent to a declaration on the part of the state that the contract should be no further prosecuted. If the contractor had, up to that time, performed all the stipulations of his contract, he could not be obliged to take down the work he had put up, or to suspend his work indefinitely at great loss to himself, without some provision being made for his compensation. Not being himself accountable for the alleged defects, it would be most unreasonable to require him to remedy them at his own expense.

If, therefore, the work was stopped by the state under such circumstances, the contractor had a right to recover the full value of the work he had done, and though it may be a question whether he should receive compensation for the work done after he was directed to stop, and whether he would not be chargeable with the expense of taking it down, I cannot admit that, of itself, the performance of that additional work afforded sufficient grounds for declaring the contract forfeited for his fault.

Per Curiam.—The award of the arbitrators is set aside with costs, and it is adjudged by this Court that *McGinley* take nothing by this suit.

J. Morrison and *S. Major*, for the state.

J. G. Marshall and *R. Crawford*, for the appellee.

LITTLE v. BRANNENBURGH.

A person who has lost money, or a valuable thing, by betting upon a horse-race, may recover back the money, or the value of such thing, under the R. S. 1843, by an action of debt, if prosecuted within six months after the loss.

ERROR to the *Madison* Circuit Court.

Friday, December 24.

SMITH, J.—This was an action of debt. The declaration contains two counts. The first count alleges that within six months before the commencement of the suit,

Nov. Term, 1852.

THE TERRE HAUTE DRAWBRIDGE COMPANY v. HALLIDAY.

the defendant was indebted to the plaintiff 25 dollars for money lost by betting upon a horse-race, and paid to the defendant, contrary to the form of the statute, &c. The second count is similar to the first, except that it is for the value of an ass which the plaintiff lost by betting on the said horse-race, and delivered to the defendant. The cause was submitted to the Court upon the general issue, and judgment was rendered for the plaintiff.

A bill of exceptions sets out the evidence which sustained the averments in the declaration. The action appears to have been brought in accordance with the provisions contained in the 34th chap. of the Revised Statutes of 1843, p. 593, and we can perceive no error in the record.

Per Curiam.—The judgment is affirmed with costs.

J. Davis, for the plaintiff.

S. Smith, for the defendant.

THE TERRE-HAUTE DRAWBRIDGE COMPANY v. HALLIDAY and Another.

Action by the owners of a steamboat against the *Terre-Haute Drawbridge Company* to recover damages occasioned by the wrongful detention of the plaintiffs' boat by an obstruction created by the defendants' bridge. On error it was maintained that the plaintiffs should have been required to prove, in order to maintain their action, that the boat was licensed under the act of Congress of 1838. *Held*, that, supposing it was necessary that the boat should have been licensed, the license was to be presumed in the absence of evidence to the contrary.

The charter of the *Terre-Haute Drawbridge Company* does not authorize the company to create any obstruction to the navigation of the *Wabash* river in constructing their bridge.

By an obstruction is meant such an impediment to the navigation that boats in passing along the stream could not by the use of skill and care avoid being injured.

Saturday, January 1, 1853.

APPEAL from the *Sullivan* Circuit Court.

SMITH, J.—This was an action on the case brought by

the appellees against the appellant. The declaration contains five counts. The first three are for damages occasioned by the detention of a steamboat, by reason of an obstruction of the river occasioned by the carelessness and negligence of the defendant in constructing a bridge over the *Wabash* river, and in not opening the draw so as to permit the plaintiffs' boat to pass.

The fourth count alleges that the plaintiffs were the owners of a certain flat-boat loaded with pork, wheat, corn, &c., of the value of 5,000 dollars, and that in passing said obstruction, unlawfully and wrongfully placed by the defendant across said river, said boat was unavoidably cast upon one of the bents of the bridge and was sunk.

The fifth count is similar to the fourth, except that it alleges that the loss of the flat-boat was occasioned by the negligence of the defendant in suffering and permitting the usual and ordinary passage of flat-boats navigating the river between the bents or piers of the bridge, to be obstructed by a sunken flat-boat belonging to the defendant, and by drift-wood negligently permitted to remain lodged, whereby the passage of the plaintiffs' boat through said ordinary passage was impracticable, and the plaintiffs were compelled to attempt another passage between the bents or piers of the bridge, the same being unusual and hazardous, whereby their said boat was lost, &c.

The defendant pleaded not guilty, and there was an agreement that all matters of defence which could be specially pleaded should be given in evidence under that issue.

The cause was tried by a jury, who found a verdict for the plaintiffs and assessed their damages at 3,750 dollars, for which sum judgment was rendered, a motion for a new trial having been overruled. The evidence is set out in a bill of exceptions.

The plaintiffs proved that their steamboat, the "*William H. Day*," was detained at the bridge in question, in consequence of the draw being incomplete and insufficient to permit her to pass, for several days on several different

Nov. Term, 1852.

THE TERRE HAUTE DRAWBRIDGE COMPANY v. HALLIDAY.

occasions, and that they had thereby incurred a considerable loss. They also introduced evidence to prove that, on one of these occasions, the boat arrived at the bridge on the 2d of *January*, and was detained three days, and that, in consequence of this detention, the boat afterwards, on her return trip, having proceeded, after passing the bridge, to *Lafayette*, and intending to return from thence to the mouth of the *Wabash* river, was frozen up in the ice and detained thirty-two days, whereas, had it not been for the previous detention at the bridge, she could have made her passage to the place of her destination before the navigation of the *Wabash* was interrupted by ice.

The evidence relative to the flat-boat was, that the plaintiffs loaded a boat at *Logansport* with five thousand five hundred bushels of oats, worth 55 to 60 cents per bushel; four hundred and fifty-five bushels of wheat, worth 75 to 100 cents per bushel; and that the boat was worth 500 dollars. The boat was navigated by a captain and six bow-hands. The passage was favorable until the boat arrived at *Terre-Haute*, where, when intending to pass through one of the spans of the bridge, the boatmen discovered, or thought they discovered, a log some forty or fifty feet long, lodged against the pier and obstructing the passage. As soon as they discovered this obstruction, they endeavored to pass through another span, but, in this attempt, the boat was cast against the pier and stove by the force of the current.

The evidence as to the degree of skill with which the boat was managed is contradictory. It was stated by several witnesses who saw the boat approaching, that it was injudiciously managed; that it approached the pier quartering, whereas, if it had been straightened, it would have passed without difficulty. But the hands on the boat testified that they were forced into this position by the wind and current, in endeavoring to avoid the obstructions resting against the piers and preventing them from passing through the ordinary channel.

Some witnesses for the defendant stated that a great many boats passed the bridge safely on the day the plain-

tiffs' boat was stove; that it was easy for a competent pilot to pass safely; that the crew of the boat seemed to be confused and were pulling different ways; that the obstructions resting against the pier consisted of a tree about twenty-five or thirty feet long and six inches in diameter, with a brush top, and a saw-log ten or twelve feet long; and that a little while after the plaintiffs' boat struck, another boat came along and knocked them away, without sustaining any injury.

The defendant proved that the bridge was built pursuant to a contract, by *Madison* and *Hall*, and an attempt was made to show that the *Drawbridge Company* was not responsible for the damages sustained by the plaintiffs, because, at the time those damages were sustained, the bridge was still in the hands of the contractors. The company had, however, appointed a toll-collector who commenced taking tolls for said company before the losses of the plaintiffs had occurred.

The bridge has six spans or spaces between the piers. The first, next the western shore, is fifty feet wide. The three next are each one hundred feet wide. The two next the eastern shore, at one of which there is a draw, are each about fifty feet wide. Flat-boats usually passed through the three widest spans.

At the time the plaintiffs' boat was sunk, there was a flat-boat which had sunk shortly before, lying against the second pier from the western shore, and extending nearly equally, according to its length, which was about seventy-five feet, across the two first widest spans. This boat was connected by a cable with the western shore.

The tree and saw-log were resting against the second pier from the eastern shore, in the same manner. It was stated by some witnesses that they presented no real obstruction to the passage of a boat, though as they were partially sunk, and there was a ripple running over them, they might have presented an appearance of danger to persons on an approaching boat.

Upon the evidence being concluded, the Court gave several instructions to the jury, and refused to give some

Nov. Term, 1852.

THE TERRE HAUTE DRAWBRIDGE COMPANY v. HALLIDAY.

instructions which the defendant requested should be given.

One of the errors assigned is, that to sustain their action for damages occasioned by the detention of the steamboat, the plaintiffs should have been required to prove that the boat was licensed under the act of Congress of 1838.

Supposing, however, that it was necessary the boat should have been licensed to enable the owners to recover for her detention, we think such license is to be presumed in the absence of evidence to the contrary. We know of no instance where persons who are required by statute to take out licenses for the privilege of carrying on particular kinds of business, are required to aver they had such license to enable them to maintain suits for breaches of contract, or for damages sustained by the wrongful conduct of others in reference to such business. It is a rule of law that every one is presumed to have acquitted himself of his engagements and duty, and to have complied with the requirements of a positive law. See Cow. & Hill's Notes to Phil. on Ev. pp. 296 to 299, where numerous cases are cited. The case of *Sissons* v. *Dixon*, is analagous to the one before us. The plaintiff, at *Dublin*, delivered a parcel of goods to the defendant, who was a common carrier, to be forwarded to *Liverpool*. The law required the goods to be duly entered at the custom house, without which entry the importation was illegal. The action was case for the loss of the goods, and it was contended that the plaintiff should have proved that such entry was made; but it was held that the presumption was that the plaintiff had complied with the law, and as no proof was given that the goods were not duly entered, that ground of defence failed. 5 Barn. & Cress. 758.

The Court instructed the jury that under the ordinance of 1787, the act of Congress to enable *Indiana* to form a state constitution, and the state constitution, the state has no power to obstruct the navigation of any navigable stream within the state, nor to authorize any person to do so; and that the state has not done or attempted to do

so by the act authorizing the construction of the bridge in question, it being a condition implied at least, if not expressed, that the corporation, in building the bridge, should create no obstruction to the navigation of the river.

We think this instruction, qualified as it was by several subsequent instructions, cannot be objected to, as, whether the ordinance of 1787 is now in force or not, the charter does not authorize the corporation to create any obstruction to the navigation of the river, in constructing their bridge. It does not, however, follow, that any pier or other necessary work placed in the bed of a river to support a bridge, against which a boat might run and be damaged, would be such an obstruction as is here contemplated. By an obstruction we mean such an impediment to the navigation that boats in passing along the stream could not, by the use of skill and care, avoid being injured; and the jury were very clearly informed that this was the sense in which the term was used in the instructions given. They were told that to entitle the plaintiffs to recover, the latter must show that they had made use of ordinary skill and care to prevent being injured, and, at the request of the defendant, an instruction was given, that if a skillful and careful pilot could have steered the flat-boat under the bridge safely and without injury, and the same was lost through negligence, carelessness, and unskillfulness, the jury should find for the defendant.

It is probably sufficiently clear from the evidence that the piers of the bridge ought not of themselves to be considered an obstruction to the navigation, but the relevancy of these instructions is supported by the evidence relative to the logs which had drifted against one of the piers, and to the sunken flat-boat.

It is manifest from the evidence and the amount of the verdict, that the jury found that the bridge, with the drift logs and sunken boat, did create such an obstruction as to render the defendant liable for the damages occasioned by the loss of the plaintiffs' flat-boat, and as that was a question for the determination of the jury, and the in-

Nov. Term, 1852.

THE TERRE HAUTE DRAW-BRIDGE COMPANY v. HALLIDAY.

structions relative to it are not objectionable, we cannot say the finding as to this point was wrong.

The Court refused to give an instruction, requested by the defendant, to the effect that the plaintiffs could not recover damages for the detention of their steamboat in the ice, after passing the bridge, and before getting out of the *Wabash* river. We think it sufficiently appears, however, that the jury did not estimate any damages for that detention.

The jury, in estimating the damages, appear to have confined themselves wholly, or almost wholly, to the loss sustained by the sinking of the flat-boat. That boat, with the oats and wheat, were worth, at the lowest prices stated, 3866 dollars, and the proceeds of the sale of the whole, after the boat was sunk, deducting the expenses, amounted to 120 dollars, leaving the loss 3,746 dollars. This amount of loss is within 4 dollars of the amount of the verdict, and as the plaintiffs, if they were entitled to recover any thing for the destruction of this boat, were entitled to the damages they had actually sustained by its loss, we think we are not at liberty to disturb the judgment; though if damages had been given for the detention of the steamboat in the ice, or it did not clearly appear that damages were not given for that detention, we are inclined to think that the judgment must have been reversed for the refusal of the Court to give the instruction relative to the measure of damages which was requested by the defendant.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

J. P. Usher, for the appellant.

G. S. Orth, *A. M. Crane*, and *E. H. Brackett*, for the appellees.

REYNOLDS *v.* ROCHESTER.

Money obtained by fraud may be recovered back in assumpsit.

In an action to recover back money obtained by fraud, proof that the defendant obtained a part of the money for the use of a third and innocent person, is no defence against the recovery of that part.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Saturday, January 1, 1853.*

PERKINS, J.—Assumpsit by *William K. Rochester* against *William F. Reynolds*, upon the common counts. Plea, the general issue. Jury trial, and verdict and judgment for the plaintiff. It was insisted upon the trial, and evidence was given tending to establish the fact, that the money sought to be recovered by this suit had been obtained by the defendant from the plaintiff by fraud.

Money obtained by fraud may be recovered back in an action of assumpsit. *McQueen* v. *The State Bank of Indiana*, 2 Ind. R. 413. Whether that in this case was so obtained, was a question for the jury, and was fairly submitted to them upon the evidence. We cannot disturb their verdict.

The point is made, that though *Reynolds* obtained the money by fraud from *Rochester*, still he obtained a part of it for the use of a third and innocent person, and hence should not be liable for that part himself.

We do not think he should be allowed, after obtaining money from another by fraud, to say that he did not use all the money he so obtained for his own advantage, but shared it with an innocent person.

We think the judgment below should be affirmed.

Per Curiam.—The judgment is affirmed with 3 per cent. damages and costs.

Z. Baird, for the appellant.

R. C. Gregory and *S. A. Huff*, for the appellee.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1853, IN THE THIRTY-SEVENTH YEAR OF THE STATE.

Puett and Others *v.* The State Bank.

A plea which professes to answer a whole count, but answers only a part, is bad on general demurrer.

To the declaration upon a promissory note, the defendant pleaded as to part, &c., that the plaintiff agreed to assign him a judgment against one *B.* of the amount which the plea professed to answer, and that as to so much, &c., that agreement was the consideration of the note; that the judgment was assigned, but "without recourse" upon the assignor; and so the consideration as to so much, &c., had failed. *Held*, that the plea was bad, it not appearing that the defendant had placed or offered to place the parties in the position they occupied prior to the assignment.

ERROR to the *Parke* Circuit Court. *Monday, May 23.*

Stuart, J.—Debt on a promissory note. Five pleas filed, leading to issues of law and fact. Trial by the Court, and judgment for the plaintiff below.

The third and fifth pleas alone are before us on demur-

Note.—Judge *Roache*, owing to indisposition, was absent during the first five days of this term.

May Term, 1853.

PEET v. BEERS.

rer. The third plea professes to answer the special count on the note, but is an answer to only a part of that count. This Court has repeatedly decided such plea bad on general demurrer.

The fifth plea sets up in avoidance as to part, &c., that the defendant in error agreed to assign *Puett* a judgment against *Briggs* and others, of the amount which the plea professes to answer; that this agreement was, as to so much, &c., the consideration of the note sued on; that the judgment was assigned, &c., but "without recourse" on the assignor; and so the consideration as to so much, &c., had failed. We think the demurrer to this plea well taken. To sustain the plea would be giving *Puett* the assigned judgment for nothing. If *Puett* intended to make the mode of assignment available as a defence, he should have placed or offered to place the parties in the position they occupied prior to the assignment. By retaining the judgment he accepted the assignment, and fixed his liability to pay for it.

Counsel contend that the assignment "without recourse" was not objectionable, because, whatever words are used, that is the legal effect, the statute making no provision for recourse over on the assignor. But as this question does not arise in the record, we give no opinion.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. A. Wright and *E. W. McGaughey*, for the plaintiffs.

S. B. Gookins, for the defendant.

PEET *v.* BEERS.

A. purchased of *B.* a tract of land in *Noble* county, received a deed, and simultaneously executed to *B.* a mortgage to secure an unpaid balance of the purchase-money. When *A.* received the deed there was a judgment against him in the *Noble* Circuit Court in favor of one *C.* *A.* afterward sold the land to one *D.*, who assumed the payment of the mortgage as

a part of the consideration, and paid the rest of the purchase-money. *Held*, that the lien of the judgment attached subject to the lien of *B.*'s mortgage. *Held*, also, that *D.*, by paying the mortgage to *B.*, became substituted as against *C.* in the place of *B.*, and entitled to all his rights and equities.

APPEAL from the *Noble* Circuit Court.

Monday, May 23.

STUART, J.—*Peet* recovered judgment at law in the *Noble* Circuit Court against one *Nimmons*. At the time of the recovery, *Nimmons* owned no real estate. He subsequently purchased a tract of land in *Noble* county, paid part of the purchase-money, received a deed, and simultaneously therewith executed to the vendor a mortgage on the premises to secure the residue. The *Peet* judgment still remained unpaid at the date of the purchase.

Nimmons then sold the land to *Beers*, who assumed the payment of the mortgage as one part of the consideration; the residue he paid at the time of the purchase. *Beers*, in ignorance, as he alleges, of the *Peet* judgment, paid the mortgage to the vendor of *Nimmons*. Execution was afterwards issued in favor of *Peet* and levied on the *Beers* land. To enjoin the sale on this execution save as subject to the mortgage for the purchase-money, *Beers* filed his bill in chancery and obtained an injunction. The bill prays that *Beers* may be subrogated, as against *Peet*, to the rights of the mortgagee, whose prior lien for the purchase-money he was compelled to discharge.

Demurrer by *Peet* overruled, and decree in accordance with the prayer of the bill. *Peet* appeals.

Counsel for *Peet* say they are at a loss to know on what principle of law or equity this decree was rendered, and rely entirely on 1 Ind. R. 259. If the execution had been levied on the land prior to the sale by *Nimmons* to *Beers*, it will hardly be contended that the mortgagee could not, as against *Peet*, have proceeded in chancery to enforce his prior lien for the purchase-money. In other words, such sale must have been subject to the mortgage; for that was the extent of the leviable interest which the execution-defendant had in the land. The vendor's lien for the purchase-money was superior to that of the *Peet*

May Term, 1853.

PEET v. BEERS.

judgment. 2 Story's Eq. sec. 1228.—1 Freem. Ch. 85.—7 Blackf. 249.

The case cited above by counsel for *Peet*, simply decides that a judgment attaches as a lien on land subsequently purchased, the instant such judgment-debtor acquires title. 1 Ind. R. 259. But this doctrine must be taken with a qualification, namely, that such lien attaches, subject to the vendor's lien for the purchase-money.

This prepares the way to consider the main question. Was *Beers*, who paid off the vendor's lien, (or which was the same thing, the mortgage,) entitled, as against *Peet*, to be subrogated to the vendor's rights and equities?

The doctrine of subrogation, as between surety and principal, is well settled. But this case does not come within that class. Courts of equity have, however, carried the doctrine of subrogation much further than the relief of sureties. Several authorities decide that those standing in the situation of sureties, and those compelled to pay money to protect their rights, are entitled to be subrogated.

So, if a subsequent purchaser from the vendee is compelled to discharge the lien of the vendor, he is entitled to stand substituted in his place. 2 Story's Eq. 480.

From a large number of cases going more or less directly to the same point, we select two recent decisions.

The first is the case of *Buchan* v. *Sumner*, 2 Barb. Ch. R. 165. The elaborate opinion of the chancellor in this case closes in these words: "The general lien of a judgment-creditor upon the lands of his debtor is subject to all equities which existed against such lands, in favor of third persons, at the time of the recovery of the judgment. And courts of chancery will so control the legal lien of the judgment-creditor as to restrict it to the actual interest of the judgment-debtor in the property, so as fully to protect the rights of those who have a prior equitable interest in such property, or in its proceeds." In support of this doctrine, the chancellor cites 1 Paige 125.—2 Paige 217.—4 Paige 9.

The second case selected is also in the same reports—

Wilkes v. *Harris*. In this case the Court reviews the case of *Buchan* v. *Sumner*, and cites with approbation the doctrine of the former decision. And it is further added, that "it is perfectly well settled as a general principle of equity, that when one person or his property, stands in the situation of a surety for the payment of a debt for which another person or his property is primarily liable, the one who is secondarily liable is, upon payment of the debt to the original creditor, entitled to be subrogated to all the rights and remedies of such creditor. * * * And when the lien in such case is only equitable, it will be enforced in favor of the substituted creditor in preference to any subsequent lien." 2 Barb. Ch. R. 338.

Applying these principles to the facts before us, we have no difficulty in coming to a conclusion. All that could have been levied upon, had *Nimmons* still held the land, is yet subject to *Peet's* execution. He is restricted in his levy to the interest of *Nimmons*, the judgment-debtor, in the property. So that the injunction cuts him off from no security which he ever had any right to claim. We therefore conclude that as against *Peet*, *Beers* is entitled to be subrogated to all the rights and equities of the vendor whose lien he has paid.

Per Curiam.—The decree is affirmed with costs.

J. K. Edgerton, for the appellant.

J. B. Howe, for the appellee.

BAINUM *v.* SMALL.

The declaration in a suit for trespass before a justice of the peace, contained two counts. The first concluded "to the damage of the said plaintiff in the sum of fifty dollars, and he sues, &c." The conclusion of the second count was as follows: "Whereupon, by reason of all the foregoing premises, the plaintiff saith that he is injured and hath sustained damage to the amount of fifty dollars, and he sues," &c. *Held*, that the words, "by reason of all the foregoing premises," must be re-

May Term, 1853.

BAINUM v. SMALL.

Monday, May 23.

stricted to the matters set forth in the second count; and that a motion to dismiss the suit, upon appeal in the Circuit Court, for the want of jurisdiction of the justice, was correctly sustained.

ERROR to the *Dearborn* Circuit Court.

DAVISON, J.—*Bainum* sued *Small*, in trespass, before a justice of the peace. The declaration contains two counts, each of which concludes in damage to the amount of 50 dollars. Motion before the justice to dismiss the suit overruled, and judgment for the plaintiff. The defendant appealed.

In the Circuit Court the defendant moved to dismiss the suit, for the reason that the cause was not within the jurisdiction of a justice. The Court sustained the motion and dismissed the suit. Judgment was rendered for the defendant.

The first count in the declaration concludes, "to the damage of the said plaintiff of the sum of 50 dollars, and he sues," &c. And the conclusion of the last count is as follows: "Whereupon, by reason of all the foregoing premises, the plaintiff saith that he is injured, and hath sustained damage to the amount of 50 dollars, and he sues," &c. Justices of the peace have jurisdiction in "all actions founded in tort, wherein the damages demanded or the value of the property claimed does not exceed 50 dollars." R. S. 1843, c. 47, s. 2.

The question to be considered is, Do the damages demanded in this declaration, exceed 50 dollars?

The plaintiff contends that the words, "by reason of all the foregoing premises," in the conclusion of the last count, restrict the claim of damages in the action to 50 dollars. His position is not correct. "Each count in a declaration is a separate cause of action." *Swift* v. *Woods*, 5 Blackf. 97. In the present case, the first count presents an entire cause of action, and damages are therein laid and sued for. There is no reason why the claim of 50 dollars in that count should not be considered in estimating the whole amount demanded in the action.

The first count, then, being in itself complete, we think that the words, "by reason of all the foregoing premises,"

must be restricted to the matters set forth in the last count.

The plaintiff refers to *Wetherill* v. *The Inhabitants*, &c., 5 Blackf. 357. In that case the Court say, "In assumpsit and other actions sounding in damages, the sum laid in the conclusion to the declaration, constitutes the amount of the plaintiff's claim."

The language quoted obviously applies where there is one conclusion only to the whole declaration. In the case under consideration, each count has its own conclusion, and in each damages are laid and claimed.

We think that the plaintiff by his declaration demands 100 dollars in damages, a sum which, in this action, exceeds the jurisdiction of a justice.

Per Curiam.—The judgment is affirmed with costs.

T. Gazlay, for the plaintiff.

J. Ryman, for the defendant.

---

4 51
149 231

Case and Wife *v.* Wildridge and Others.

A person inherited lands in this state from her maternal grandfather and died while the R. S. of 1831 were in force, intestate, and unmarried, leaving a father surviving her, but neither children nor their descendants, nor brothers or sisters, but brothers and sisters of her mother. *Held*, that the father inherited the land.

Monday, May 23.

ERROR to the *Franklin* Circuit Court.

Davison, J.—This was a petition, under the statute, for partition.

The petition states that the petitioners are tenants in common with *John P. Case* and *Mary*, his wife, of certain real estate therein described, and prays the appointment of commissioners to make partition, &c.

Plea, that the petitioners have no title to the land described, &c., and that they and the said *Case* are not tenants in common, &c.

The cause was submitted to the Court upon a written

May Term, 1853.

CASE v. WILDRIDGE.

statement of facts. Judgment for the petitioners and partition ordered, &c.

The following are the facts: *Ralph Wildridge*, the ancestor, was the owner of the land in dispute, with other lands. His daughter *Hannah* married the said *John P. Case*. By that marriage there was issue a daughter named *Margaret*. *Hannah* died, in the lifetime of her father, intestate, leaving *Margaret* her daughter and only child. In the year 1828, *Ralph Wildridge* died intestate, leaving his children and the said *Margaret* to inherit his lands. *Margaret*, at the time of the death of her grandfather, was a minor and one of his heirs, representing her mother. After the death of *Hannah*, the said *John P.* married another daughter and heir of said *Ralph*. She is still living, and yet his wife.

In 1831, partition was made of the real estate of said *Ralph Wildridge*, deceased, among all his heirs. And the land now in dispute was set off and assigned to *Margaret*, the daughter of the said *John P.*, she being then a minor. Immediately after said partition, he took possession of said land, as guardian of his daughter, and continued in possession thereof, as such guardian, until the year 1833, when the said *Margaret* died intestate, without having been married, without issue or their descendants, and in the lifetime of her father.

Since the death of *Margaret*, the said *John P.* has retained possession of and occupied said land, and received the rents and profits thereof, claiming it as heir of his said daughter.

The petitioners are the brothers and sisters, and the descendants of the brothers and sisters of *Hannah Case*, the mother of said *Margaret*.

The question to be considered is, who is entitled to the land, the petitioners or *John P. Case*, the father of *Margaret?*

The statute of 1831, regulating descents, &c., must govern the descent in this case.

That statute contains the following provisions, viz.:

"Sec. 1. That the real and personal estate of any per-

son dying intestate, shall descend to his or her children, or their descendants, in equal parts, viz., to the children of the deceased child, the share of their deceased parent, saving, however, to the widow, in all cases, the right of dower.

"Sec. 2. If there be no children, nor their descendants, then to the father; and if there be no father, then in equal parts to the mother, brothers, and sisters of such deceased person dying intestate, and to their descendants."

"Sec. 4. When any person shall die intestate, without issue, possessed of a title to any real estate, by purchase with the estate of, or by descent from the mother, neither the father of such person, nor any child he may have by any other woman, shall inherit the same or any part thereof, if there be living any brother or sister of the mother of such person, or any lineal descendant of either of them." (1)

Under the 2d section of the act, the father of *Margaret* must inherit the land in controversy, unless such construction of the fourth section can be given as will bring the petitioners within its provisions.

In this case, the person dying intestate did not acquire title "by purchase with the estate of, or by descent from her mother;" but she inherited from her maternal grandfather, and took "the share of her deceased parent."

The terms used in the fourth section, viz., "by descent from the mother," seem to create the difficulty in giving an interpretation to the statute.

The defendants insist that the real intention of the legislature, as shown by the whole statute when taken and compared together, was to exclude entirely the maternal line from inheriting paternal estates, and the paternal line from inheriting maternal estates.

Indeed, there seems to be no good reason why an estate "taken as representative of the mother," should descend in a line different from one derived "by descent from the mother." And we are not prepared to say that the intention of those who made the law may not have been as insisted by the defendants. But, from a view of the whole

May Term, 1853.

CASE v. WILDRIDGE.

act, we can find nothing that would authorize the construction contended for. The terms, "by descent from the mother," as used in the fourth section, are too explicit to admit of any interpretation other than that which they literally import.

It has been said that "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction." *Fisher* v. *Bligh*, 2 Cranch 399; and that "the best rule by which to arrive at the meaning and intention of the law, is to abide by the words which the law-maker has used." Wharton Dig. 569. In *Gardner* v. *Collins*, 2 Peters 58, it was held, "that the words descent *from* a parent cannot be construed to mean descent *through* a parent." And it seems to us that it would be equally at variance with every fair rule of construction to interpret the words "descent from the mother," to mean descent from the maternal grandfather, or "taking the share of the deceased parent."

The record shows that when *Hannah* died, the land in dispute was vested in her father. The descent was cast directly from him to his grand-daughter. *Hannah* never was seized. And it follows that no title to the premises could be derived from her by descent.

The facts presented do not, in our opinion, bring the petitioners within the fourth section of the act referred to. And we think that *John P. Case* is entitled to the land as heir to his daughter.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. Holland, for the plaintiffs.

J. Ryman, for the defendants.

(1) R. S. 1831, p. 207.

COMPARET and Others v. RANDALL.

An administrator is not authorised by the R. S. 1843, to take possession of the real estate of the intestate, if the heirs are present.

An order of the Probate Court for the leasing of real estate of an intestate upon the petition of the administrator, is erroneous, if the heirs of the intestate, being infants, did not appear to the action, and no guardian *ad litem* was appointed to answer for them.

ERROR to the *Allen* Probate Court.

Monday, May 23.

PERKINS, J.—This was a petition to the *Allen* Probate Court by *Franklin P. Randall*, administrator on the estate of *Francis Comparet*, deceased, for permission to sell or lease real estate of which said *Comparet* died seized, for the payment of debts. The heirs of said *Comparet*, who were minors, were made parties, and summoned to appear, &c. They made default, and a decree was rendered that the administrator should lease their land. No guardian *ad litem* was appointed.

Where heirs are present, the administrator is not authorized, of his own volition, to take posssession of the real estate of the estate upon which he administers. R. S. 1843, p. 571. The control of the real estate assumed by *Randall* in this case must, therefore, depend upon the authority conferred by his legal proceedings. Those proceedings were erroneous, in the omission to appoint a guardian *ad litem* to answer for the heirs; *Hough* v. *Canby*, 8 Blackf. 301; and must, consequently, be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick, for the plaintiffs.

F. P. Randall, for the defendant.

May Term, 1853.

LAW v. SMITH.

LAW and Others *v.* SMITH and Others.

4 56
130 139

4 56
136 657

4 56
139 30

4 56
141 448

4 56
146 539

The return upon a *fi. fa.* that it was levied "upon the property of" the execution-defendant, without designating the kind, quantity, or value, and accompanied by no other paper or memorandum to remove the uncertainty, is void for uncertainty.

A levy is *prima facie* a satisfaction of the execution; but it may be shown to have proved to be not an actual one.

Judgments against *A.* and *B.* in the Circuit Court. The judgments having become dormant, a *scire facias* was issued on each of them, and served on *B.*, the survivor, and there was a judgment of revivor. That in the first case was as follows: "On motion, it is ordered that the judgment heretofore rendered in this case, be revived against *B.* as administrator of *A.*, and against *B.* (the former judgment having been rendered against *B.* and *A.*) and the defendant in mercy," &c. The judgment of revivor in the second case, was as follows: "The parties appeared, and, on motion, the same orders." *Held*, that the judgments of revivor, though informal, were not void.

Judgment against *A.* and *B.* *A.* having died, and the judgment having become dormant, it was revived by *scire facias* against *B.* and *A.'s* administrator, *A.'s* heirs not having been made parties. When the debt was contracted, and the proceedings upon *scire facias* had, the real estate of a decedent was subject to sale, by statute, upon a judgment against his administrator, without notice to the heirs. *Held*, that it was, therefore, only necessary to join the administrator of *A.* with *B.* to obtain a judgment on *scire facias*, on which the lands of *B.*, and those which *A.'s* heirs had inherited from him, could be sold.

A sale of real estate upon execution, without appraisement, is proper, if at the date of the contract upon which the judgment was rendered, the law did not require that lands to be sold on execution should first be appraised.

Where it does not appear that the rents and profits of land were not first offered upon a sale on execution, it will be presumed that they were first offered.

Great inadequacy of price will not vitiate a sale of land upon execution, where the inadequacy has been occasioned by the improper conduct of the execution-defendant.

A voluntary conveyance of lands made by father to son, to prevent their being subjected to the payment of his debts—whether he is indebted as principal or surety—may be set aside by his creditors, and the land may be subjected to the payment of their debts.

But the creditors will not be allowed to set aside the conveyance, until they have exhausted the other property of the grantor.

An adverse possession, to confer title, must, under the R. S. 1843, have been exclusive and continuous for twenty years, under such circumstances as show the party to have been occupying upon a claim of ownership in himself of the premises.

The possession of an execution-defendant is not adverse to the purchaser under the execution.

If a person enter upon land under a conveyance purporting to convey the legal title, and continue to occupy for a period of twenty years afterward, as owner, an adverse possession is shown.

ERROR to the *Pike* Circuit Court.

Monday, May 23.

PERKINS, J.—Bill in chancery by the devisees of *George W. Ewing*, against the grantees of *Hosea Smith* and their assigns, to set aside conveyances of real estate made by said *Hosea*, as fraudulent. The title of the plaintiffs to the lands in question, rests upon sheriff's sales made under judgments against said *Hosea* and one *Benjamin Rice*, pursuant to which deeds were made to their devisor, one for a part of the premises, on the 17th day of *February*, 1825, and another for the remainder, on the 17th of *February*, 1826.

Answers, exhibits, and replications were filed, depositions taken, the cause heard on its merits by the Circuit Court, and the bill dismissed.

Several grounds are taken by the defendants in support of said decision.

They insist, in the first place, that the plaintiffs have no valid title to the lands in dispute, and hence, cannot sustain this bill, because the sales on execution, through which their pretended title is derived, were void.

The judgments upon which the execution-sales took place, were rendered in 1818, in suits on promissory notes, dated in 1816. On the 27th of *June fi. fas.* issued on the judgments, upon which the returns were: "Levied on the property of *Benjamin Rice* and *Hosea Smith*, *July* 30th, 1818, and execution and sale stayed by order of the plaintiff. *July* 23d, 1818."

Afterwards, and prior to *December*, 1818, *Rice* died, and said *Hosea Smith* was appointed his administrator.

At the *June* term, 1820, of the Circuit Court, "the said Court," the answer to the bill admits, "upon a *scire facias* issued upon each of said judgments, and served on said *Hosea Smith*, rendered a judgment of revivor." The judgments of revivor were in these words: In the first

May Term, 1853.

LAW v. SMITH.

case, "On motion, it is ordered that the judgment heretofore rendered in this case be revived against *Hosea Smith* as administrator of *Benjamin Rice*, deceased, and against *Hosea Smith*, (the former judgment having been rendered against *Hosea Smith* and *Benjamin Rice*) and the defendants in mercy," &c.; in the second case, "The parties appeared, and, on motion, same orders."

On these judgments *fi. fas.* were issued, and levied upon real estate of *Smith*, "but too late to sell," and *alias fi. fas.* were issued, on which returns were made that the property levied on by the former *fi. fas.* was not sold for want of a buyer, accompanied by an appraisement amounting to 4,371 dollars and 66 cents. This was in 1821. A series of writs of *venditioni exponas* followed, till, upon one issued in 1823, a sale was effected of the real estate appraised, to *Geo. W. Ewing*, at 337 dollars and 37 cents. In 1825, a deed was made by the sheriff pursuant to the sale, and in the same year a further sale of other lands was made under executions on said judgments, to said *Ewing*, and, in 1826, a deed was executed by the sheriff purporting to convey the lands sold at that sale, to the purchaser. Both of the deeds from the sheriff were duly recorded.

No writs of *venditioni exponas* appear to have issued to compel a sale of the property taken by virtue of the first executions which were issued, in 1818, on the judgments; and it is claimed that said judgments have, therefore, from that time remained satisfied. The returns upon the executions of 1818 were, that they were levied "upon the property of *Benjamin Rice* and *Hosea Smith*," without designation of the kind, quantity, or value, and were accompanied by no other paper or memorandum that removed their uncertainty; and they were, therefore, void for uncertainty (1). Further, a levy is but a *prima facie* satisfaction, and may be shown to have proved not an actual one. *Doe* v. *Dutton*, 2 Ind. R. 309. The subsequent proceedings by *scire facias*, show that the levies in this case did not prove actual satisfactions. Indeed, but a small portion of the judgments appears to have been ever collected.

It is also objected, that the judgments of revivor upon *scire facias* were void, and authorized no executions. They are copied above. They were informal, but, we think, not void. The record in each case, shows that the necessary party was notified, appeared, and had an opportunity to make any defence that might exist against the award of execution, and shows the judgment of the Court in the premises, that none such was shown to exist. A case was presented to the Court in which a formal judgment, instead of an order, should have been entered; and perhaps the same particularity would not be required in a judgment of revivor upon *scire facias*, that would be necessary in the original judgment.

But it is further urged, that said judgments, if good in form, could not authorize the sale of the real estate of either *Smith* or the heirs of *Rice*, because said heirs were not made parties, in either case, with *Smith* to the *scire facias*, and *Erwin's Lessee* v. *Dundas*, 4 How. U. S. R. 58, is cited. This position would be correct, if the law did not permit a sale of the real estate of heirs without a judgment against them. But by the law of *Indiana*, at the time the debts in question were contracted, and the proceedings upon *scire facias* had, the real estate of which a person died seized, as will appear from an inspection of the statutes, was subject to sale for his debts, upon a judgment against his administrator, and without notice to his heirs. Hence it was necessary to join only the administrator of a deceased joint-debtor with the survivor, to obtain a judgment, upon which the lands of the one, and of the heirs of the other, could be sold. See *Fritz* v. *Evans*, 13 S. & R. 14.

Again, it is objected that the sale of the property was without appraisement, the law, at the date of the sale, requiring one; that it does not appear that the rents and profits were first offered for sale; and that the small sum at which the sale was made, compared to the value of the property sold, was such as to vitiate the sale.

But the law at the date of the contracts did not require

May Term, 1853.

LAW v. SMITH.

an appraisement before sale of property on execution, and, hence, a sale in this case, without an appraisement, was proper; and, it not appearing that the rents and profits were not first offered, it will be presumed that they were so; and the small price for which the property sold, having resulted from the improper conduct of the execution-defendant, *Smith*, in throwing a cloud upon the title to it, as will subsequently appear in this opinion, the defendants in this case cannot make an objection on that ground.

We think the proceedings upon the executions were not void.

But prior to the rendition of the judgments on which said executions issued, *Hosea Smith*, the judgment-debtor, whose lands were sold, had conveyed the lands away to his sons; and we must inquire into the validity of those conveyances. He first executed deeds to them in *March*, 1817. They were four in number. One to his son *Henry*, then about fifteen years old, for the S. E. quarter of section 28, and for the consideration, as stated in the deed, of 500 dollars. One to *Onias*, then about twelve years old, for a part of section 33, and for the consideration, as named in the deed, of 500 dollars. One to *Warren*, then about six years old, for a part of section 33, for the consideration of 550 dollars. One to *Hosea*, Jr., then about four months old, for the N. W. quarter of section 27, and one hundred acres out of the N. E. quarter of section 28, and for the consideration of 1000 dollars. These deeds, it is said, were deeds of gift, made by the donor to his sons, in pursuance of a long indulged intention, and just upon the eve of his departure upon a long journey, from which he feared he might never return. They were not recorded, but handed to a son-in-law, who deposited them in a bureau in the donor's house, where they remained, and were never taken away by the son-in-law, to whom they were delivered. In *March*, 1818, said *Hosea*, Sen., having returned from his journey, and supposing the deeds he had previously made to be invalid, he executed another

set of deeds, in all respects like the first, and caused them to be recorded. These latter deeds were executed but a short time before the judgments first mentioned in this suit, were rendered against said *Hosea* and *Rice*, amounting to near 1,800 dollars, and of which but 411 dollars were ever made in exhausting the property of *Rice* and *Smith*, other than these lands conveyed by *Smith* to his sons. At the same time that *Smith* made the first set of deeds, in 1817, he executed to his son-in-law, *Charles Alexander*, leases for the several tracts of land described in the deeds, reserving rent payable to himself, which leases were for different terms of years, covering the minority of his sons respectively; but said *Alexander* never, in good faith, took possession of and cultivated the lands leased, as a tenant, and it was never intended that he should.

We cannot doubt that the above-mentioned conveyances must be held fraudulent as to creditors. Some effort has been made to show that *Smith* was but a surety in the debts for *Rice*, and that at the time the conveyances in question were made, it was supposed *Rice* would be fully able to pay the debts. Results, however, demonstrated the contrary, and *Smith*, who was the partner of *Rice*, must be supposed to have known more accurately than others his true situation. The most favorable view, then, for the defendants, in which this case could be looked at, would be to regard it as presenting this question: Can a man indebted in large amounts, whether as principal or surety, make a voluntary conveyance of his property, and thus defeat the collection of said debts? We think not. The claims of justice are paramount to those of affection and charity. A man thus indebted may undoubtedly make a voluntary conveyance that will be valid, as such a conveyance should not be attacked by creditors till after his other property is exhausted, and, it proving sufficient for the payment of his debts, the voluntary conveyance should stand. In this case such other property did not prove sufficient, and *Smith*, having been the administrator of *Rice*, cannot be supposed to have wasted

May Term, 1853.

LAW v. SMITH.

the effects left by him. We will remark, however, that for the decision of this case, we do not deem it necessary to go the length of the proposition we have laid down above, as the circumstances indicate that the conveyances of *Smith* to his sons, were made with the intention and purpose of preventing the lands conveyed being made subject to the payment of the debts mentioned.

Adverse possession is also set up by the defendants in bar of the plaintiff's claim of title.

The deeds made by *Smith* to his sons having been fraudulent, the property in question must be considered, so far as this case is concerned, to have been in him at the time of the sheriff's sales and conveyances. The conveyances were in 1825 and 1826. Any possession claiming to be adverse to the title of the plaintiffs must, therefore, commence at or subsequently to the former of those dates.

An adverse possession, giving title, is one that is exclusive and continuous, for, under our statutes, twenty years, under such circumstances as show the party to be occupying upon a claim of ownership, in himself, of the premises. The circumstances evidencing such a state of facts are various. If a possession is hostile in its commencement, as if one actually oust or disposses another, for example, one joint-tenant his co-tenant; or if one enter under another, and subsequently disclaim his title; or if he enter under a conveyance purporting to convey the legal title, and continue to occupy for twenty years afterwards as owner, an adverse possession will be shown.

The suit in this case was commenced in *February*, 1847. Twenty years anterior to that date would be *February*, 1827. So early as that, then, a possession adverse to *Ewing*, the purchaser at sheriff's sale, must have commenced, to have ripened into a perfect title before the commencement of this suit.

The sons severally took possession of their respective tracts, says *Charles Alexander*, "when they became of age or got married." *Ashbury Alexander* says they took possession as they became of age; and, as there is no

evidence that any of them married before they were of age, that time may be taken for the commencement, respectively, of their several possessions. Till that period they remained in the family of their father, on the farm, working with him, as usual. *Henry*, one of the sons, arrived at majority in 1823, and *Onias*, another of them, in 1826. The possession of these two had, therefore, been sufficiently long, and we think it was adverse. The deeds to them from their father were void as to creditors, but valid as against himself, and they had not, at the dates of *Ewing's* purchases, been decided to be void as to creditors. The sons undoubtedly occupied the lands, claiming to be the fee-simple owners.

The other two sons, *Warren* and *Hosea*, Jr., became of age, the former in 1832, the latter in 1838. Their possessions, therefore, though adverse, had not, at the commencement of this suit, been of sufficiently long continuance to perfect their title. Up to the times that the sons respectively took possession, the father, *Hosea*, Sen., the execution-defendant, remained in possession, and the possession of an execution-defendant is not adverse to the purchaser under the execution. The leases mentioned above, we do not regard as having any influence in the case. (2).

Lapse of time is also urged in the argument of the cause, as evidence of abandonment of all claim on the part of the plaintiffs. Had this ground been set up in the answer, even, we do not think it would have availed. *Ewing* obtained his titles in 1825 and 1826. He died in 1838. He had prosecuted an action of ejectment in his lifetime, to which *Hosea Smith*, Sen., appeared as the defendant. In 1839, a *scire facias* on the judgment in ejectment was prosecuted by the devisees, and, in 1840, a writ of possession was awarded in said suit against *Hosea*. In 1847, the plaintiffs, several of them being still infants, filed this bill. There were mistakes in the descriptions of the tracts, &c., in the proceedings at law, but those proceedings go to rebut a presumption of abandonment.

May Term, 1853.

LAW v. SMITH.

We think the Court below erred in dismissing the bill as to all of the defendants.

Per Curiam.—The decree is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

S. Judah and *I. Blackford*, for the plaintiffs.

J. G. Jones, for the defendants.

(1) See, as to the certainty with which the property should be described in the levy, *Throckmorton* v. *Moon*, 10 Ohio R. 42; *Brown* v. *Dickson*, 2 Humph. 395; *Huddleston* v. *Garrott*, 3 id. 629; *Pound* v. *Pullen*, 3 Yerg. 338; *Waters* v. *Duvall*, 6 Gill and Johns. 76.

(2) The R. S. 1852 enact that actions for the recovery of the possession of real estate shall be commenced within twenty years after *the cause of action* has accrued, and not afterwards, except in certain enumerated cases. R. S. 1852, p. 75, *et seq.*

The R. S. 1824, 1831, 1838, and 1843, enacted that no action of ejectment should be commenced or maintained, for the recovery of any lands or tenements, against any person or persons who might have been in the quiet and peaceable possession of the same, *under an adverse title*, for twenty years, either in his own right, or the right of any other person or persons under whom he claims. Certain exceptions are mentioned.

The second section of the act of 3 and 4 *William* 4 of *England*, is as follows: "And be it further enacted, that after the 31st day of *December*, 1833, no person shall make an entry or distress, or *bring an action to recover any land* or rent but within twenty years next after the time at which the right to make such entry or distress, or *to bring such action*, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or *to bring such action*, shall have first accrued to the person making or bringing the same."

In *Nepean* v. *Doe*, 2 Mees. and Welsby, 894, the Court say in reference to that act: "We are all clearly of opinion that the second and third sections of that act have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the act, the question is whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession.*" The third section of that statute relates to the time when the right to bring the action shall be deemed to have accrued. The section will be found at large in Greenl. Cruise on Real Property, vol. 3., p. 434. And in *Culley* v. *Doe*, 11 Adol. and Ellis, 1008, the Court, after reciting the second section of the *English* statute above quoted, say: "The effect of *this* section is to put an end to all questions and discussions whether the possession of lands, &c., be adverse or not; and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry ac-

crued above twenty years before bringing the ejectment, is barred by this section." See also notes to *Nepean* v. *Doe*, 2 Smith's Lead. Cas. 464, *et seq.*

From the phraseology of the statute of 1852, and the decisions under the *English* statute above quoted, it would seem to follow that, in *Indiana*, in an action for the recovery of real estate, where the statute of limitations is pleaded, the question whether the possession has been adverse or not, is unimportant, except in certain cases to show when the right of action accrued, and, save in the enumerated cases which are exceptions to the general statute, the question is whether twenty years have elapsed since the right accrued, *whatever be the nature of the possession.*

PALMER *v.* EGBERT.

When an agent takes a note in his own name for a debt due to his principal, and assigns the note to the latter, the maker cannot set up as a defence to a suit by the latter upon the note, that when it was made the agent was not authorized to take it in his own name.

APPEAL from the *St. Joseph* Circuit Court.

Tuesday, May 24.

STUART, J.—*Palmer*, the assignee of a note, brought suit against *Egbert*, and recovered. *Egbert* appealed to the Circuit Court. On the trial in that Court, a jury was waived, and there was a finding for the defendant. Motion for a new trial overruled, and judgment on the finding. The evidence is all set out in a bill of exceptions.

The assigned note was the only evidence for the plaintiff. On the part of the defence, it appeared that *Chapin*, the payee of the note, was the agent of *Palmer* to rent certain property in *South Bend;* that *Egbert* had occupied the property; that the consideration of the note was rent due from *Egbert* to *Palmer;* that in settling the rent *Chapin* took the note payable to himself, and before suit assigned it to *Palmer;* that there was no other consideration for the note passing between *Chapin* and *Egbert*, save the rent due *Palmer*. Unlike the case of *Corning* v. *Strong* and others, 1 Ind. 329, there is no controversy or misunderstanding between *Chapin* and *Palmer* in relation

May Term, 1853.

BENTON v. SHREEVE.

to it. On the contrary, the acts of *Palmer* sanction the course pursued by his agent.

It does not seem to us that there is any obstacle in the way of *Palmer's* recovery. The record will be ample protection to *Egbert* to bar any other suit for the rent.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Jernegan, for the appellant.

J. B. Niles, for the appellee.

BENTON *v.* SHREEVE and Others.

To entitle a person to a specific performance of a sheriff's sale—if the sale can be at all enforced in equity—he must have filed his bill within a reasonable time, paid, or offered to pay, the purchase-money, and, in case of an offer, have followed up the tender by bringing the money into Court.

A junior mortgagee who, to protect his own interest, purchases the mortgaged premises at a sale upon foreclosure of the first mortgage, is entitled to be subrogated to all the rights and equities of the first mortgagee.

Gross inadequacy of price is not sufficient to set aside a judicial sale; but such inadequacy may be a controlling element, in connection with other circumstances, in determining its validity.

The opinion of the legislature, repeatedly expressed through the appraisement laws, is not without its uses to our own Courts, in aiding them to come to correct conclusions as to what shall be deemed adequacy or inadequacy of price.

A sheriff who, having several executions in his hands upon decrees of foreclosure against the same land, sells the land upon the execution having the preference, for a sum more than sufficient to satisfy it, should apply the surplus upon the other executions, according to the order of their preference.

The fact that the purchaser under the first execution has not fully paid the purchase-money, does not authorize the sheriff to sell upon the execution next having preference. His act in accepting a part of the purchase-money, obliges him to take the proper steps to coerce payment of the residue.

May Term, 1853.

BENTON v. SHREEVE.

ERROR to the *Wayne* Circuit Court.

STUART, J.—This was a bill in chancery by the heirs, &c., of *Caleb Shreeve*, deceased, against *Benton* and others. *Benton* answered. The other defendants made default. The cause was set down for hearing on the bill, answer of *Benton*, depositions, &c., and there was a decree in favor of the complainants. *Benton* prosecutes this writ of error.

Tuesday, May 24.

It appears that on the 27th of *May*, 1837, lot No. 60, in *Richmond*, owned by one *Forsha*, was mortgaged to *Joseph Derickson*, to secure the payment of 200 dollars, and interest at 10 per cent. On the 24th of *May*, 1838, *Forsha* sold and conveyed the lot to *Olds*. In *November* following *Olds* mortgaged the lot to one *Green*, to secure the payment of 200 dollars. And in *December*, 1838, *Olds* executed a second mortgage on the same lot to *Shreeve*, to secure another 200 dollars, with 10 per cent. interest. *Derickson* assigned his mortgage to *Sarah Derickson*, and *Keefer* became the remote assignee of *Green's* mortgage.

Both these latter mortgages were afterwards foreclosed. The *Derickson* decree was against *Forsha* and *Olds*, as defendants; the *Keefer* decree against *Olds* alone. *Shreeve*, the junior incumbrancer, was not made a party to either.

Executions were issued on the several decrees, and placed in the hands of the sheriff about the same time, though there is some confusion of dates. On the 30th of *January*, 1841, the lot was sold on the *Derickson* decree to *Caleb Shreeve* for 560 dollars. *Shreeve* paid 232 dollars and 60 cents on the *Derickson* execution, and failed to complete the further payment embraced in his bid. No deed was ever made or tendered by the sheriff, nor any further steps taken by him to compel *Shreeve* to pay. The sheriff returned the execution indorsed according to the facts. The *Derickson* decree was entered satisfied of record, with an express reference to the return of the sheriff as to the mode of payment.

On the same day, *January* 30, 1841, the sheriff sold the same lot on the *Keefer* decree to *Benton*, for 25 dollars. Deed by the sheriff to *Benton* accordingly.

Shortly after, *Caleb Shreeve* died, leaving the complain-

May Term, 1853.

BENTON v. SHREEVE.

ants below his heirs, &c. *Olds* is also dead, leaving the defendants of that name his heirs, &c. *Keefer*, the assignee of the *Green* mortgage, was a party defendant. Thus all the parties having an interest in the subject matter were before the Court.

The answer of *Benton* puts nothing in issue material to the decision of this cause.

The bill contains four alternative prayers. One is for the specific performance of the sheriff's sale on the *Derickson* decree. That such a sale may be enforced in equity, is not without authority; but in this state it has been doubted. 8 Blackf. 105. Even if such sale could be enforced, the heirs of *Shreeve* are not in a position to seek it successfully. Neither by their ancestor nor by them was the purchase completed. To entitle a purchaser to such relief, he must have paid the money, or offered to pay it. He must follow up the tender by bringing the money into Court. Nor will specific performance be decreed where there has been unreasonable delay on the part of the purchaser. 4 Scam. 202.—4 J. C. R. 559. —4 Rand. 478.

Another of the alternative prayers was, that the *Shreeve* heirs be subrogated to the rights and remedies of *Sarah Derickson*. That was, in substance, the decree; and it is correct, as far as it goes. *Shreeve* had paid off that decree with the obvious purpose of protecting his own junior mortgage. He was not a party to the foreclosure, and, perhaps, he was still entitled to redeem. But it is sufficient that he had an interest to protect, and it is but fair to presume, what the whole transaction tends to show, that he acted with reference to the protection of that interest. He was, therefore, entitled to be subrogated. 2 Story 480.—7 Paige 248.—Leading E. C. 86–7.—*Peet* v. *Beers*, at the present term. (1) The case of *Eddy* v. *Traver, et al.*, is a strong illustration of the leaning of the *American* courts in favor of the doctrine of subrogation. 6 Paige 521. (2)

Another of the alternative prayers of the bill is directed against the validity of *Benton's* purchase. *Benton* had no

lien on the lot, no rights to protect. Nor is he a purchaser without notice; for he had constructive notice of the several mortgages. He had also constructive notice of all the facts returned by the sheriff as to the sale on the *Derickson* decree, and the payment of part of the purchase-money by *Shreeve*. Indeed, his answer, connected with other circumstances, goes far to establish actual knowledge. At the time *Benton* purchased for 25 dollars, most of the witnesses concur that the lot was worth 500 to 600 dollars; at the time of taking the depositions, 1,300 dollars; and that the rents and profits enjoyed by *Benton* were more than equal to the improvements he had made.

It thus appears that the price paid was about a twenty-fourth part of the value of the lot at the date of the purchase. On this ground, counsel contend that the sale to *Benton* was fraudulent and void, and rely on 1 Blackf. 410.—6 J. C. R. 411. But, on close examination, it will be seen that neither of these cases is in point. The ground on which those sales were set aside was, that the sheriff put up and sold at one time a large quantity of land, susceptible of division, and which should have been offered in suitable parcels. The amount due on the execution, and the price the land sold for, are thrown in by the Court in giving the history of the case, merely as supplemental. Here there is no pretence that the property could have been advantageously divided, but only that the price was inadequate.

As to what is inadequacy of price, the books are not agreed. Some authorities place the standard at one point, others at another. And in general, courts pay great regard to the circumstances and the equities involved in each case. Under the civil law, contracts for the sale of land were rescinded if the price was below half the value. 1 Story Eq. sec. 244, *et infra*. So it was in *France*, before the revolution. *Kent*, chancellor, in 2 J. C. R. 1. Perhaps a stranger, speaking of our appraisement laws, would refer them to the same class. At an early day, our statute placed the standard at one-half; later, at two-thirds,

May Term, 1858.

BENTON v. SHREEVE.

&c. True, at the date of the *Keefer* mortgage, there was no appraisement law in force. Yet, in the consideration of doubtful cases, under judicial sales, the repeatedly expressed opinion of the legislature, as to what the standard should be in such sales, is not without its uses to our own courts in aiding them to come to correct conclusions as to adequacy or inadequacy of price.

In relation to different contracts, courts recognize different standards. Thus Chancery will often refuse to enforce specific performance of a contract, which, if executed, it would also refuse to set aside, leaving the parties to their legal remedies. 2 Story's Eq. 5.—11 Peters 229. —3 Cow. R. 445.—Sax. 320.—2 Blackf. 431. In *Seymour* v. *Delancy, Kent*, Chancellor, refused specific performance, adding, that the inadequacy of price was so great (one-half) as to give to the contract the character of hardship, unreasonableness and inequality. 6 J. C. R. 222.

In regard to the rescission of contracts on account of price, there is a general concurrence of authority in this rule, that mere inadequacy of price is not sufficient ground to set aside a sale, unless the inadequacy be so gross as to be of itself evidence of fraud. *Osgood* v. *Franklin*, 2 J. C. R. 1—affirmed by the Court of Errors on appeal. 14 J. R. 527. Thus, also, land estimated by the witnesses at from 3,000 dollars to 3,500 dollars, was sold for 2,900 dollars; held, that the inadequacy was not so gross as to indicate fraud. 1 Hoff. C. R. 37. So where land valued at 1,800 dollars, was sold at sheriff's sale for 400 dollars, it was held by this Court that the consideration could not be considered grossly inadequate. 2 Ind. 442. On the other hand, where a trustee sold and conveyed the trust lands worth 500 dollars, for 50 dollars, (one-tenth the value) the sale was set aside as fraudulent.

In view of these authorities, it is easy to conclude that the price paid by *Benton* was grossly inadequate.

But the authorities indicate a further distinction between private and public sales.

The rule that a sale will be set aside for gross inadequacy of price applies only to private sales, and not to

sales at public auction. 1 Freem. 441. So in *Livingston* v. *Byrne*, the Court of Errors held unanimously that inadequacy of price was not sufficient to invalidate a judicial sale, unless there be additional circumstances to justify it. And that decision is placed on the authority of Lord *Elden*, in *White* v. *Damon*, 7 Ves. Jr. 34. See, also, accordingly, 3 Hay.—1 Spears's Ch. 351.—2 Green's Ch. 460.

The rule to be deduced from these authorities, as applicable to this case, is, that gross inadequacy of price is not sufficient, of itself, to set aside a judicial sale like that to *Benton;* but that such inadequacy may be a controlling element, in connection with other circumstances. The reason given in the books for this distinction between public and private sales, is, by no means, satisfactory. At first thought, the stringency should be the other way. It would seem, however, to have been recognized as the law, by this Court, in a very strong case, which, under all the circumstances, presses the doctrine to its utmost tension. *Roe* v. *Ross*, 2 Ind. 99. In that case, the sheriff sold a house and lot worth 1,200 to 1,500 dollars, for 111 dollars, and the Court held, that in the absence of fraud, the price was not inadequate.

It only remains to inquire whether the case under consideration furnishes any of the "additional circumstances" contemplated by the authorities. We think it does. The number of parties having equitable liens on the lot, is a circumstance of no inconsiderable weight. In most of the authorities cited, the question arose, as in *Roe* v. *Ross*, supra, directly between the execution-defendant and the purchaser in an action at law. Such is the position, in part, of the heirs of *Olds*, in this case, to *Benton*. They reaped the benefit of all the mortgages. Theirs was the fault that these mortgages were not paid off without legal process. If they stood alone, the heirs of *Olds* would present a feebler claim to equitable relief. Not so with the other parties. They advanced their money. They took this lot as the security. It was ample, or nearly so, for the purpose. With great force and justice do they appeal

May Term, 1853.

BENTON v. SHREEVE.

to the equity of the courts not to suffer them to be defrauded under the forms of legal process.

There is another circumstance, of a very conclusive character. The sale of the lot on the *Derickson* decree, placed at the disposal of the sheriff more than sufficient to pay both mortgages. The sum (560 dollars) was in contemplation of law, in the hands of the officer for the very purpose of paying both. If *Shreeve* refused to complete the purchase, the law pointed out to the sheriff several modes of procedure. His act in accepting part of the purchase-money, committed him to one course—to take the proper steps to coerce payment, and apply the balance of the bid on the *Keefer* decree. To sell on the junior decree, after he had sold on the senior for sufficient to pay both, was useless trifling. There was nothing further which the sheriff had a right to sell on the *Keefer* decree, or that *Benton* could purchase.

Here, then, was property encumbered by three mortgages, of sufficient value to pay nearly all of them, already sold on a senior mortgage, resold on a junior mortgage, for a trifle, and to one having no interest in the lot, leaving the creditors unpaid, the security exhausted, and the mortgagor still liable for the debts as the law then stood. To support such a sale, a Court of equity should require very strong authority, directly in point, and based upon very strong reasons of public policy.

We therefore conclude that the second sale was, under all the circumstances, a gross abuse of his power on the part of the officer—a fraud on *Keefer*, and on all the parties interested. Connecting the acts of the officer with the position and knowledge of *Benton*, the transaction was clearly fraudulent, and must be declared void. 5 Blackf. 260.

The evidence fully sustains the decision of the Court below, that the rents and profits enjoyed by *Benton* were an equivalent for the improvements he had made. A strict adherence to the authorities would deprive *Benton* of the interest on the 25 dollars purchase-money. 1 Dana

56.—2 *id.* 374.—4 *id.* 507.—5 *id.* 119. But there are also numerous authorities the other way. With the rescission of the contract, and the refunding of the purchase-money, it seems the vendee (*Benton*) should be required to deliver possession of the premises. 4 Ham. 229.

The case is now in a position to enable the Court below to administer equitable relief to all the parties. The *Shreeve* heirs represent the first and third mortgages, *Keefer* and *Benton* the second mortgage, and the heirs of *Olds* the equity of redemption. The latter should be allowed a reasonable time, say sixty days, to discharge the incumbrances; in default thereof, the lot should be sold and the liens paid in the order of their priority.

Per Curiam.—The decree is reversed—the parties, plaintiff and defendants, to pay their own costs. Cause remanded with instructions to the Circuit Court to enter a decree in accordance with the principles above indicated.

C. H. Test, for the plaintiff.

J. Perry, for the defendants.

(1) *Ante*, p. 46.

(2) In *Eddy* v. *Traver*, cited in the text, the facts were these: *G. Eddy*, the ancestor, died intestate in 1828, leaving four children, of whom *Sally*, the wife of *Traver*, was one. In *April*, 1829, *Traver* and wife conveyed with warranty to *Ross*, their undivided one-fourth of a parcel of the real estate of which the intestate died seized, leaving their undivided interest in the premises of which partition was sought in this case, undisposed of. The personal estate of the intestate being found insufficient to pay the debts, the personal representative obtained an order to sell a part of the lands conveyed by *Traver* and wife to *Ross;* and the proceeds thereof were applied to the payment of the intestate's debts. As *Traver* and wife still owned their undivided one-fourth of the premises, which were subsequently decreed to be sold in the partition suit, *Ross* claimed to have an equitable lien on their undivided interest therein, to remunerate him for his one-fourth of the lands sold as aforesaid, the proceeds of which were applied to debts for the payment of which *Traver* and wife were liable on account of the lands descended to the wife. *Ross* also claimed interest from the time he was divested by the sale. On this state of facts, the chancellor held that *Ross* had an equitable lien upon the residue of the lands remaining in the hands of *Traver* and wife, to the extent of his share of the proceeds of the land sold by the order of the surrogate. And he lays it down as an established principle of equity, that a surety, or one who stands like *Ross*, in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay,

May Term, 1853.

WORTMAN v. ASH.

as to any fund, lien, or equity which the creditor had against any other person or property on account of such debt. In the course of his opinion, the chancellor cites *Watts* v. *Kinney*, 3 Leigh's R. 272, where the sureties had actually paid the debt, so that the lien of the creditor's judgment was discharged at law; yet the Court decided that the sureties were in equity entitled to the benefit of the judgment, as a lien on the land, against the claims of an attaching creditor.

WORTMAN *v.* ASH.

The declaration in a suit brought by an infant, did not show that the next friend named therein was admitted by the Court, nor that he filed his consent to act as such, agreeably to the statute; but no objection was made to the declaration, on that account, before verdict. *Held*, that, after verdict, the objection must be considered as waived.

Tuesday, May 24.

ERROR to the *Ripley* Circuit Court.

DAVISON, J.—Trespass by the defendant in error against the plaintiff in error. Plea, not guilty. Verdict and judgment for the plaintiff below.

The commencement of the declaration is as follows: "*George Ash*, (an infant under the age of twenty-one years, by his next friend, *Littleton Ash*,) complains of *George W. Wortman*, defendant, in a plea of trespass," &c.

The plaintiff objects to the declaration, because it does not show that the next friend therein named was admitted by the Court; nor does it show that he filed his consent to act as such, agreeably to the statute. See R. S. 1843, p. 679, ss. 58, 59, 60.

This objection was not presented to the Court below; and it seems to us, that it is one that should have been made at the earliest stage of the proceedings. We are referred to *Shirley* v. *Hagar*, 3 Blackf. 225. In that case it was held that a declaration stating that the plaintiff sues by *prochein amy*, without showing the plaintiff's in-

fancy and the *prochein amy's* admission, was bad on general demurrer.

In the present case, the plaintiff failed to demur to the declaration. His objection to it is first raised in this Court. We are of opinion that the defect complained of must, after verdict, be considered as waived. *Usher* v. *Cornwell*, 3 Ind. R. 210.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. Ryman, for the plaintiff.

S. S. Harding, for the defendant.

---

4 75
127 171

WARD *v.* WALTON.

The parties to a written contract, not under seal, may, before breach, enter into a valid oral contract providing for its discharge by the delivery of property, or in any other manner.

By agreement between the maker and payee of a promissory note, after its execution, the payee was to receive lumber in satisfaction of the note; and the maker, before the note became due, had substantially performed his part of the agreement. *Held*, that such performance was a sufficient defence in a suit against the maker by an assignee to whom the note had been indorsed after it became due.

APPEAL from the *Randolph* Circuit Court.

Tuesday, May 24.

DAVISON, J.—*Ward* sued *Walton* before a justice of the peace, on a promissory note for the payment of 25 dollars. The note was dated *June* 29, 1847, and payable to *Wolf* and *Shaw*, two years after the 1st of *January*, 1848, and by them, on the 2d of *January*, 1850, assigned to the plaintiff.

The defendant before the justice filed six special pleas. The first, second, third and sixth pleas will not be noticed, as they present no point in the case.

The fourth plea states that the defendant had paid the note to *Wolf* and *Shaw* before notice of the assignment,

May Term, 1853.

WARD v. WALTON.

by selling and delivering to them certain plank lumber, specified in the plea, and that they accepted and received the same in full satisfaction of the note.

The fifth plea alleges that the defendant paid the note to *Wolf* and *Shaw* before notice of the assignment, as follows: 30 dollars in plank, 20 dollars in money, 10 dollars in wheat, and 10 dollars in wood, which he prays may be made a set-off against the note. The defendant was also entitled to the general issue.

The justice gave judgment for the defendant. The plaintiff appealed. In the Circuit Court the cause was submitted to the Court by consent of the parties. The Court found for the defendant. Motion for a new trial overruled, and judgment on the finding of the Court.

There is a bill of exceptions, which professes to contain all the evidence in the cause.

The following are believed to be the material facts in this case. Sometime in the fall of 1848, *Wolf* and *Shaw* entered into a contract with the defendant to receive of him plank lumber in payment of said note. The plank was to be five-eighths of an inch thick, and to be estimated at the price of 62 and one-half cents per hundred, at the mill, or 75 cents, delivered. In *May*, 1849, the defendant, in pursuance of that contract, delivered to them four hundred and eighty feet of plank, of the value of 3 dollars and 60 cents. About the 1st of *January*, 1850, *Wolf* and *Shaw* notified the defendant that they should not want the plank, not sawed, until the summer of 1850; to stick what was to be sawed up at the mill, and bring on the lumber then sawed. The plaintiff, in *January*, 1850, gave the defendant notice of the assignment of the note. On the 2d of *February*, 1850, the defendant delivered to *Wolf* and *Shaw* one thousand, six hundred and ten feet of plank, worth 12 dollars and 7 cents, and on the 3d of *March* following, five hundred and seventy feet, worth 4 dollars and 20 cents. At that time the defendant had at his mill one thousand, four hundred and forty-two feet of plank, of the value of 10 dollars and 81 cents, stuck up and ready to be delivered to *Wolf* and *Shaw*, upon their order. In *March*, 1850,

the plaintiff called on the defendant for payment of the note, when the defendant told him to hold on until the next week, and he would pay it. He also stated that *Shaw* had agreed to take payment of the note in lumber.

It seems to us that the contract set up by the defence, constituted a valid bar to the action. The note was a contract, not under seal, and it was, no doubt, competent for the parties, before breach, to enter into a verbal contract providing for its discharge, by the delivery of property, or in any other mode agreed on between them. Such contract was made; and the evidence shows that under it the defendant delivered to *Wolf* and *Shaw* two thousand, six hundred and sixty feet of plank, a part of which was delivered before the note was due. It is also shown that the defendant, in accordance with their directions, had sawed and on hand one thousand, four hundred and forty-two feet of lumber, to be delivered to them upon their order; and that the value of the plank delivered and on hand for delivery was, at least, equal in amount to the note and interest.

In *Rhodes* v. *Thomas*, 2 Ind. 638, it was held, that "parties to a written contract, not under seal, may, after its execution, dissolve, or waive, or discharge, or qualify the contract, or any part of the same, by a new verbal contract, and such waiving, &c., if made before breach, will be a good defence in a suit on the contract." This authority we regard as decisive of the question before us.

The facts presented by the record, in our opinion, produce a strong case. Here was not only a new verbal contract for the discharge of the note in plank, entered into before the note was due, but, at least, a substantial performance of it by the maker of the note.

The evidence shows that in *March*, 1850, the plaintiff called on the defendant for payment of the note, when he told him to hold on until the next week, and he would pay it; at the same time stating that *Shaw* had agreed to take lumber for the note.

The plaintiff contends that this promise should have been considered binding on the defendant to pay the note

May Term, 1853.

CARTER v. SPENCER.

to the plaintiff. We are not of that opinion. That promise does not appear to have been founded upon any consideration; nor does it appear that the proposal to the plaintiff, "to hold on until the next week," was accepted by him. And, moreover, the statements of the defendant, on the occasion referred to, when taken together, obviously show that he did not intend to admit that he was liable to pay the note.

We think the motion for a new trial was correctly overruled.

Per Curiam.—The judgment is affirmed with costs.

D. Kilgore and *W. A. Peelle*, for the appellant.

B. McClelland, for the appellee.

CARTER v. SPENCER.

To authorize a judgment by default in the Probate Court against an administrator, under the R. S. 1843, he must have been served with process at least twenty days before the first day of the term.

Where the declaration consists of a special and the common count, and the defendant has made default, the common count should be dismissed, or the damages assessed by a jury; otherwise the judgment will be erroneous.

Tuesday, May 24.

ERROR to the *Cass* Circuit Court.

PERKINS, J.—Assumpsit by *Spencer* against *Carter*, administrator upon the estate of *Tipton*, deceased, in the *Cass* Probate Court. The declaration contained a special count on an order for the payment of money, and the common counts. Process was served on the defendant less than twenty days before the first day of the term of the Court to which the writ was returnable. There was a judgment for the plaintiff on the default of the defendant, and an assessment of damages by the Court.

Process should have been served twenty days before the first day of the term of the Court at which judgment was rendered. *Jones* v. *Roland*, 8 Blackf. 272. This case

is under the statutes of 1843. As to the common counts a *nolle prosequi* should have been entered, or the damages should have been assessed by a jury. *Starbuck* v. *Lazenby*, 7 Blackf. 268.

May Term, 1853.

Coe v. Smith.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

Coe v. Smith, Administrator.

4 79
149 638

Where an attorney at law engages to defend a cause for a specific sum, and dies before the cause is determined, his administrator may recover from the client, upon the *quantum meruit*, the amount which the intestate's services were really worth to him.

The recovery cannot, however, exceed the contract price, or the rate of it for the part of the service performed.

Where the general issue is in, and special pleas are filed which raise no point of which the defendant could not have availed himself under the general issue, the question whether the Circuit Court improperly set aside the special pleas, is an immaterial one.

ERROR to the *Marion* Circuit Court.

Tuesday, May 24.

Perkins, J.—Assumpsit by *Smith*, administrator of *Sweetser*, against *Coe*, for work and labor, &c., performed for the latter by *Sweetser*, in his lifetime. The cause was tried by the Court upon the general issue, and a judgment was rendered for the plaintiff for 175 dollars.

Three special pleas were filed by the defendant and set aside by the Court on the motion of the plaintiff; but they raised no point in the defence of which the defendant could not have availed himself under the general issue, and the action of the Court in reference to them was, consequently, immaterial.

The facts in the case, shortly stated, are, that *Coe* employed *Sweetser*, a lawyer, to defend a suit at law for him, agreeing to pay him for so doing, 500 dollars. *Sweetser*

May Term, 1853.

Cox v. Smith.

labored in the defence for a time, but died before the suit was determined, and *Coe* employed another lawyer to continue the defence. This suit is by *Sweetser's* administrator against *Coe*, not upon the contract, but upon the *quantum meruit*, to recover from *Coe* the amount that *Sweetser's* services were worth to him. It is contended that the suit cannot be sustained because the contract for the service was entire, and the service has not been fully performed. There are numerous authorities that sustain this position. They decide that in the case of an entire contract, there can be no division or apportionment. *Cutter* v. *Powell*, in which the administrator of a sailor, who had contracted to perform a voyage for a certain sum, and died before its termination, was denied the right of recovering anything for the part performed, may be regarded as a leading case. *Kent*, vol. 3, p. 471, note, says, at common law, "if a servant was hired for the month or year, and the service ceased within the time, there was no apportionment of wages for the actual time of service, though the rule operated in some cases most unjustly."

In some courts, however, this doctrine seems to have been doubted, if not denied. *Kent*, to the observation above quoted, adds: "The old rule is now held to be relaxed, and wages, it is understood, may be apportioned upon the principle that such is the reasonable construction of the contract of hiring. Lawrence J., 6 Term R. 326. *McClure* v. *Pyatt*, 4 McCord, 26.—*Bacot* v. *Parnell*, 2 Bailey S. C. R. 424." And Judge *Story*, in *Brooks* v. *Byam, et. al.*, 2 Story's R. 525, decided in 1843, seems to think the maritime law should have been applied to give a different decision in *Cutter* v. *Powell*. He says, "The case of *Cutter* v. *Powell*, (6 Term R. 320) is directly in point, although I entertain considerable doubt whether, by the maritime law, the contract in that case was not divisible."

But the present suit is not upon the special contract, and does not seek to recover the sum stipulated in it, or any apportionment of it, but is upon a common count in

assumpsit, for the purpose of recovering from *Coe* the reasonable worth of *Sweetser's* services to him, and rests on the principle, as laid down by Judge *Dewey* in *Lomax* v. *Bailey*, 7 Blackf. 599, "that where one party to a special entire contract has not complied with its terms, but professing to act under it, has done for or delivered to the other party something of value to him, which he has accepted, no action will lie on that contract for the work done or thing delivered; but that the party who has been thus benefited by the labor or property of the other, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him."

This principle received the sanction of this Court in the case quoted from, in *Milnes* v. *Vanhorn*, 8 Blackf. 198, and in *McKinney* v. *Springer*, (1) *Epperley* v. *Bailey*, (2) and *Manville* v. *McCoy*, (3) *November* Term, 1851, and we adhere to the decisions in those cases. In *Fenton* v. *Clark*, 11 Vt. Rep. 557, it is decided that where *A.* contracted with *B.* to labor for him four months from a given day, at 10 dollars per month, and to receive no pay until he had worked the four months, and was prevented from completing the four months' labor by reason of sickness, he might recover upon a *quantum meruit*, for the services performed; and the case of *Britton* v. *Turner*, 6 N. H. Rep. 481, is cited with approbation. This decision the Supreme Court of *Vermont* reaffirms in *Seaver* v. *Morse*, 20 Vt. Rep. 620.

But it is urged in this case, that the doctrine laid down in *Lomax* v. *Bailey* can only be applied in cases where the benefited party, on the breach of the contract, wrongfully fails to restore to the other party what has been received under it, and thus to place him in *statu quo*, and that there can be no such wrongful failure in contracts for personal services, because the parties, in such cases, cannot be placed in *statu quo;* but the authorities will not justify such an idea, for it is not necessary to a recovery in any case, that there should be a wrongful refusal to restore to the party in default what has been received, and but few cases occur in which such restoration can

May Term, 1853.

Cox v. Smith.

take place, and the party knows this fact while receiving the part performance. In a great majority of cases where there is a special entire contract for the delivery of articles of property, such as pork, hay, wood, &c., and in which actions are sustained, consumption, or a second sale, takes place as fast, or nearly so, as the delivery, and without the expectation that the contract is to be broken; so that it is out of the benefited party's power, and without fault on his part, when the breach does occur, to place the opposite party in the condition in which he was when he entered into the contract; but it is not out of his power to make compensation for what he cannot return. The case of *Lomax* v. *Bailey*, *supra*, where one party had furnished the materials, or a part of them, out of which the other had manufactured for him machines, was one in which the parties could not be placed in *statu quo*. It was not in the power of the receiver of the machines to restore to the mechanic his labor spent in making them. And it is this reception and enjoyment, with the known inability to make specific restoration, upon which an assumpsit is raised. The principle is general in its application; it is compensation for benefit received and enjoyed, and not the restoration of the specific article that must take place; and the doctrine of implying an assumpsit from circumstances, is not new to the law, but is a familiar one. If a man has in his hands the money of another which, in equity, he should pay to him, the law will imply an assumpsit to pay it; 2 Greenl. p. 87; and why not, if he has received benefit from the property or labor of another, which in equity he should pay for, imply an assumpsit to pay for it? He is to pay no more than the amount in which he has been benefited, and this will be determined by the jury, all things being considered; the manner of the breach of the contract, whether with or without cause; the inconvenience and damages resulting, &c.; and the amount recovered must, in no case, exceed the contract price, or the rate of it for the part of the contract performed. This, policy would not permit, lest a temptation should be held out to break contracts in an advanced

stage of performance, in hopes of higher compensation than might be stipulated for in the contract.

We think the suit in this case may be sustained.

The Circuit Court permitted witnesses on the trial to be asked the question generally, what were the services of *Sweetser*, rendered in the suit against *Coe*, worth? and it is contended here that the Court erred in so doing. It is insisted the question should have been, of what benefit were they to *Coe?* and undoubtedly this latter would have been a proper question; but as the Court, on the trial, also permitted this latter question to be asked, and the further question, what damage there was to *Coe* in *Sweetser's* failing to complete his contract, we think no harm was done in permitting the question objected to, to be asked. Indeed, we think it a proper question to be put in such a case by the plaintiff, as, *prima facie*, the benefit to the party receiving the services would be measured by their worth; and it would seem to be the appropriate business of the defendant to bring out the facts, in his examination, showing that such was not the fact in the particular case.

On the weight of evidence we cannot disturb the finding of the Court. (4)

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

H. C. Newcomb, for the plaintiff.

H. O'Neal, for the defendant.

(1) 3 Ind. R. 59.—(2) Id. 72.—(3) Id. 148.—(4) This case overrules the doctrine laid down in *De Camp* v. *Stevens*, 4 Blackf. 24, as to the right of recovery upon the part performance of an entire contract for personal service.

May Term, 1853.

PRIDDY v. DODD.

PRIDDY v. DODD.

On a motion for a new trial on the ground that certain facts can be proved by an absent witness, the affidavit of the witness should be produced if it be practicable to obtain it.

At the close of the evidence in a cause, the plaintiff's counsel addressed the jury without any restraint as to time. The defendant's counsel having declined to reply, the plaintiff claimed the right to close the argument, which, upon objection being made, the Court refused to permit. *Held*, that in the consumption of time in the argument of causes, much must necessarily be left to the discretion of the judge sitting at the trial, and that discretion not appearing in this case to have been abused, *held*, that the ruling of the Court should not be disturbed.

Where the error assigned is the overruling of a motion for a new trial, no points will be regarded by the Supreme Court as arising in the record, which were not made in the Court below.

Wednesday, May 25.

APPEAL from the *Huntington* Circuit Court.

STUART, J.—*Priddy* brought replevin against *Dodd* for a horse. Plea, property in the defendant. Replication, that the property was not, at, &c., the property of the defendant, but of the plaintiff, &c., concluding to the country. On this issue the cause was submitted to a jury. Verdict and judgment for the defendant.

A motion for a new trial made at the proper time was overruled. The evidence is all set out in a bill of exceptions.

The plaintiff rested his motion for a new trial solely on his own affidavit, setting out for cause, &c., that he was taken by surprise by the evidence of one of the defendant's witnesses; that he could successfully contradict said witness by one *Henry Ewbank;* that *Ewbank* lived in *Huntington* county, and could be readily procured in case a new trial was granted, &c. There was no affidavit of *Ewbank* as to what he would swear in contradiction of the witness in question, though *Ewbank* seems to have been present at the trial; for, in another part of the bill of exceptions, it appears he was called as a witness for the defendant, and testified that he knew nothing about the matter.

The motion for a new trial was correctly overruled.

The same point has been decided at least twice by this Court. 3 Blackf. 304.—4 Blackf. 308. In the latter case, the Court in substance say: "If the plaintiff finds himself unprepared to meet the defendant's evidence, it is in his power to suffer a nonsuit. It would be giving the plaintiff too great an advantage, to permit him to take the chance of a verdict, and when it is lost, to relieve him from its consequences, and give him a chance with another jury, merely because the evidence against him was stronger than he expected." And again, "If he would satisfy the Court that the facts could be proved, he should produce the affidavit of the witnesses themselves to that effect, or account for its absence." We see no reason why this case should be made an exception to such a salutary rule.

The bill of exceptions raises a further question in relation to the order of argument. Upon the close of the evidence, the plaintiff's counsel addressed the jury without any restraint as to time. The opposite counsel declining to reply, the plaintiff claimed the right to close, which, on objection being made, the Court refused to permit. To this ruling the plaintiff excepts, as an unwarranted invasion of his rights.

We cannot so regard it. The right claimed, like many other things incident to the progress of a suit, was a matter very much in the discretion of the Court. From the state of facts disclosed in the bill of exceptions, we cannot say that the discretion was abused. The presumption is in favor of its sound exercise. Perhaps it was in accordance with one of the rules of the *Huntington* Circuit Court. If so, it was properly enforced. In the consumption of time in examining witnesses and arguing causes to the jury, much must necessarily be left to the discretion of the judge. It is peculiarly within the province of judicial discretion to see that these operations are not needlessly protracted, to the delay and detriment of other business on the docket.

There is, moreover, in this instance, a strong common sense in support of the action of the Court. The

May Term, 1853.

Orr v. Baker.

plaintiff had already an opportunity to present his case to the jury, which the record shows he had embraced fully, and rested. If he did not put the jury in possession of his views, it was his own fault. He has but fallen into the snare he had, perhaps, spread for his opponents. It was no invasion of the rights of any one for the Court to hold, that the struggle thus closed could not be renewed.

We have been thus particular because the point is warmly pressed by counsel. The other points raised in argument, cannot be regarded as arising in the record. They were not made below—it is too late to make them here. The verdict is not an unnatural sequence from the evidence, and should not be disturbed.

Per Curiam.—The judgment is affirmed, with costs.

D. D. Pratt, for the appellant.

J. R. Slack, for the appellee.

Orr *v.* Baker.

4 88
158 641

The statute which exempts persons or property from taxation, is to be construed strictly.

The statute which exempts from taxation the lands whereupon every building erected for religious worship is situate, not exceeding ten acres, was not intended to include any part of the land which is diverted to secular uses for gain.

Wednesday, May 25.

ERROR to the *Vanderburgh* Circuit Court.

Stuart, J.—Assumpsit by *Baker* against *Orr*, on a promissory note. Plea, failure of consideration. Demurrer to the plea sustained, and judgment in favor of the plaintiff below.

The plea alleges that the trustees of the *Evansville* Presbyterian church were seized in fee of lot No. 107, in *Evansville*, being less than ten acres, to-wit: fronting

on *Main* street seventy-five feet, and on *Second* street one hundred and fifty feet; that on part of said lot the house of worship of the said church was erected; that on the parcel of said lot not occupied by said meeting-house, business houses had been erected and rented out by said trustees, and the rents and profits applied to the use of the church; that the improvements so rented, &c., were taxed to the occupants in 1850, and the taxes paid; that in the same year the city of *Evansville* levied a city tax for railroad purposes, and among others, on that part of said lot No. 107, so leased, &c., as aforesaid, viz., seventy-five feet on *Main* street by sixty feet back; that on the 4th of *November*, 1850, said city tax being unpaid, the collector, after due notice, &c., sold said rented part of lot 107, to said *Baker*, for 38 dollars and 75 cents, the amount of tax due thereon, and executed to *Baker* a certificate of purchase; that on the 1st of *March*, 1851, *Baker* sold the tax-certificate to *Orr*, for 50 dollars, and thereupon the latter executed the note now in suit, and the former assigned the certificate in consideration of and concurrently with each other; that *Baker* further "warranted and guaranteed" to *Orr* that the tax, &c., had not been paid, &c., nor had the premises been redeemed at the date of the assignment; that *Baker* further agreed that any mistake, either of fact or law, should render the note void, &c. The pleader then avers that said part of said lot so rented, &c., and so owned by the said church, &c., both at the date of the assessment of the said city tax, and at the date of the sale aforesaid, was not subject to taxation, and therefore the consideration of the note had failed. Verification, &c.

If we paused to analyze this plea, it is feared we should defeat the object of the pleader, and come to conclusions unfavorable to its legal sufficiency. He obviously wishes to solicit an opinion on another point.

The question which counsel seek, somewhat circuitously, to raise by the pleadings, is whether, under the R. S. of 1843, church property, built up with business houses, and

May Term, 1853.

ORR v. BAKER.

used for secular purposes, is exempt from taxation. The clause referred to reads, "every building erected for religious worship, and the pews and furniture within the same, and the lands whereon such building is situate, not exceeding ten acres," shall be exempt from taxation. R. S. 1843, p. 208.

The true theory of taxation is to assess all property protected by the law, in proportion to its actual value. Exemptions like the foregoing are, it is presumed, made in most of the states. It is easier to admire the motives for such exemption than to justify it by any sound argument. The objections to it, even where religious corporations are to be thus favored, are both on principle and historically of great weight. With us, especially, there should be no discrimination. Only let the theory be carried a little further; let a specific tax be levied to support houses of worship, and it will speedily attract public attention. Yet the one is precisely the same in principle as the other. The tax from which one class of persons is exempt, is thrown as an additional burden on the other classes. To say that such is the practice of civilized nations, is not sound. It is rather an apology for a departure from principle. Under our institutions, there is no good reason why one species of property, or one class of persons, should be exempt from the common burdens which, for the common good, all ought equally to bear. Hence these exemptions, as they are contrary to common right, are not to be favored by the courts. They should be confined to the specified objects, and to such as by reasonable intendment the legislature must have had in contemplation. In short, the statute which exempts persons or property from taxation, is to be construed strictly.

Taking this rule of construction for our guidance, what is to be understood by the lands on which a house for religious worship is situate?

Generally speaking, a house may be said to be situate on all the lands within the same enclosure, necessary for its proper enjoyment, and actually so used and occupied.

Sheds, wood-houses, and all others proper for the convenience of the main building, are also fairly within the exemption.

The church in question, located in a growing city, owns a lot valuable and commanding for business purposes. The inducements to divert it from religious to secular uses are tempting. The revenues of the church will be thereby increased. Accordingly, the trustees set apart seventy-five by sixty feet, erect business houses, and rent them. It seems pretty clear that these business houses are "situate" where they are erected, and that, too, to the exclusion of the house of worship. We might, indeed, fancy the house of worship situate there also. But it is not presumed desirable to resort to such a fiction to sustain the claim of even a religious corporation. On the contrary, when we speak of the house of worship as situate on one part of the lot and the business houses on the other, we speak of things as they exist, in a language easily understood.

The word "situate," as here applied, is a term of relation. Relatively to us the church in question is situate in the city of *Evansville;* relatively to the greater part of the other buildings in that city, it is situate on lot 107; and relatively to those business houses rented as aforesaid, it is situate on part of that lot. In this latter sense alone is it applicable to the present case. The house is situate on so much of the lot as belongs to the same general owner, and is appropriated to the same general purpose. Where, however, any part of the lot is diverted to secular uses for gain, it ceases to be exempt. The house of worship is no longer situate on such part, within the meaning of the statute.

We think the Court ruled correctly in sustaining the demurrer to the plea.

The other sections to which we have been referred, confirm us in the above construction.

The provisions of the statute being the only authority cited, we have not examined any other. It is, however, matter of history, that several of the states have similar

May Term, 1853.

HOOKER v. FOLSOM.

exemptions. Many of the eastern churches are rich in city property, built up and rented out for secular purposes. From the fact that no reported case has been produced on either side, it is presumed there is none. It is presumed these rich religious corporations have prudently abstained from agitating a doubtful claim.

If, however, there are authorities throwing other light on the subject, they can easily be brought to our notice by petition for a rehearing.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

J. E. Blythe, for the plaintiff.

C. Baker, for the defendant.

HOOKER and Others *v.* FOLSOM, Administrator.

To constitute a breach of the covenants of warranty and seizin in a deed of land, there must have been an entire want of title in the grantor when the deed was executed, or a subsequent eviction by paramount title.

Wednesday, May 25.

ERROR to the *Clay* Circuit Court.

DAVISON, J.—Debt by *Folsom* against *Hooker* and others, on a writing obligatory for the payment of 100 dollars. Plea, failure of consideration.

The plea alleges that the writing obligatory sued on, was given in part payment, viz., for the one-third of the purchase-money of a certain tract of land purchased by said *Hooker* of one *Lewis L. Davis*, who directed the writing obligatory to be made to the plaintiff below; that *Davis* conveyed the land to *Hooker* by deed in fee, with covenants of warranty and seizin; that the only title *Davis* had to the land was obtained by him at sheriff's sale upon two executions issued on two judgments ren-

dered in the *Clay* Circuit Court, in favor of one *Osborn* and against one *Rawley*, on the 20th of *October*, 1845; that afterwards, on the 6th of *March*, 1846, the same lands were sold to one *Beasley*, by the sheriff of *Clay* county, on an execution issued upon a judgment rendered in the same Court against said *Rawley*, on a day previous to the 20th of *October*, 1845; that *Beasley* had obtained a deed from the sheriff in pursuance of the sale to him, and had commenced ejectment against *Hooker* for the recovery of the land, which action was then pending in said Court.

Demurrer to the plea sustained. Judgment for the plaintiff.

The plea avers that *Hooker* received a deed from *Davis* for the land, with covenants of warranty and seizin; but does not allege a breach of either of the covenants. Had either of them been broken before suit brought on the writing obligatory, *Hooker* might have set up that matter in his plea, as a failure of consideration.

The sheriff's sale to *Beasley* may vest in him the paramount title to the land; but such title being in him would constitute no defence to this action, until there was an eviction. That such eviction had taken place is not shown by an averment in the plea that *Beasley* had commenced ejectment for the land, and that the action was then pending.

The plea, to have constituted a valid defence to the action, should have alleged either an entire want of title in *Davis*, or an eviction by paramount title. Neither of these allegations being in it, we think the demurrer was properly sustained. *Whisler* v. *Hicks*, 5 Blackf. 100.—*Smith* v. *Ackerman*, *id.* 541.—*Pomeroy* v. *Burnett*, 8 *id.* 142.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. P. Usher, for the plaintiffs.

J. M. Hanna, for the defendant.

May Term, 1853.

HUGHES v. MCCLELLAND and Another.

HUGHES v. MCCLELLAND.

In an action against a sheriff for failing to deliver to his successor in office an execution placed in his hands, the successor is not a competent witness to prove that it was not delivered to him.

Wednesday, May 25.

ERROR to the *Fayette* Circuit Court.

DAVISON, J—This was a proceeding by notice and motion against *Hughes*, the plaintiff in error, as sheriff of *Johnson* county.

The notice alleges that *McClelland* and *Pucket*, on the 10th of *April*, 1846, recovered a judgment in the *Fayette* Circuit Court against *Thomas Williams* and others, for 130 dollars and 63 cents, with costs, &c.; that on the 3d of *June*, 1847, an execution was issued thereon, which was, on the 9th of the same month, received by *Hughes*, who, at that time and for the space of one year thereafter, was the sheriff of *Johnson* county; that he failed during the life of the execution to levy the same, although he might have done so; and that he did not return said writ within twelve months from the time he received it; nor did he deliver said writ to his successor in office.

There are four pleas. 1. The general issue—not guilty, &c. 2. That while *Hughes* had the writ in his hands, but one of the execution-defendants, viz., *Edward Williams*, resided in *Johnson* county, and that he was insolvent and had no property whereon to levy. 3. That in the month of *August* next after he received said writ, and prior to the execution thereof, he went out of office, and thereupon he handed the same over to one *Robert Johnson*, his successor in office. 4. That neither of the execution-defendants had property within his bailiwick whereon to levy, during the life of the execution.

The first plea was withdrawn. Replications were filed in denial of the other pleas.

The cause was submitted to the Court. Judgment for the plaintiffs below.

The evidence is on the record. It was proved by *Culver*, a witness, that *Hughes* received the writ on the 9th of

June, 1847; that *Edward Williams* was the only one of the execution-defendants residing in *Johnson* county; that he was reputed insolvent, and that *Hughes* could find no property whereon to levy the execution; that his term of office as sheriff expired in the month of *August*, 1847, and that *Robert Johnson* was his successor in that office. It was also proved by *Sibert*, another witness, that *Johnson* went into office on the 21st of *August*, 1847, and that the writ was in his hands in the summer of the year 1848. There was also evidence tending to prove that the writ was in his possession during its life. The writ was issued on the 3d of *June*, 1847, and an indorsement thereon, proved to be in the handwriting of *Johnson*, shows that on the 13th of *September*, 1848, he returned the same "no property," &c.

The plaintiffs offered *Johnson* as a witness in the case. *Hughes* objected to his admissibility on the ground that he was incompetent. The Court overruled the objection. He was sworn, and testified, *inter alia*, that the execution was not delivered to him, nor was the same in his hands at any time before the return-day thereof.

The only question raised is, was the witness incompetent on account of interest?

It was the duty of *Hughes*, upon the expiration of his term of office, to deliver the writ over to *Johnson*, as his successor. Whether he did so, was an important inquiry on the trial. The testimony of *Johnson* tended directly to prove that such delivery was not made, and thereby to fix upon *Hughes* a breach of duty. *Johnson* went into office in the life of the execution, and within three months after it was received. It was found in his hands, and he made return thereon after the proper time for such return had elapsed. The facts presented, apart from the testimony of *Johnson*, in our opinion, clearly establish the position that the witness was at least *prima facie* liable to the execution-plaintiffs.

Would a recovery in their favor in this proceeding bar an after action against the witness for the same cause? The question must be answered in the affirmative. The

May Term, 1853.

CONWAY v. THE STATE.

general rule is, that a verdict is evidence only between the same parties, or such as claim under them. But the reason of the rule does not apply when the verdict is produced against the party who succeeded in the former action. 1 Phill. Ev. 231, 233. The success of the plaintiffs in this cause would discharge the witness of all liability to them. *Hays* v. *Grier*, 4 Binn. 80. *Raymond* v. *Simonson*, 4 Blackf. 77. *Jenners* v. *Oldham*, 6 Blackf. 235. *McClure* v. *Whitesides*, 2 Ind. 573.

We think the witness had such an interest in the event of the proceedings as rendered him incompetent.

Per Curiam.—The judgment is reversed with costs.

S. W. Parker, for the plaintiff.

J. A. Fay and *J. S. Newman*, for the defendants.

CONWAY *v.* THE STATE.

The defendant, indicted for suffering his *mare* to be run in a horse-race, offered to adduce in evidence at the trial, a justice's docket, showing that he had been complained of before the justice and fined by him for suffering his *horse* to be run in a horse-race, and to prove, by parol, that it was a *mare*, and not a *horse*, for the suffering of which to be run, he had been fined by the justice. *Held*, that the Court properly refused to admit the evidence.

Wednesday, May 25.

ERROR to the *Henry* Circuit Court.

PERKINS, J.—Indictment against *John Conway* for suffering his *mare* to be run in a horse-race. Conviction and fine in the Circuit Court.

On the trial the defendant offered to introduce in evidence the docket of a justice of the peace, showing that he had been complained of before said justice and fined by him for suffering his horse to be run in a race, and to accompany the introduction of said docket by parol evi-

dence tending to establish the fact that it was a *mare* and not a *horse*, for the suffering of which to be run he had been fined before the justice. The Court refused to receive the evidence.

Our statute on this subject is, that if any person shall knowingly suffer "his horse, mare, or gelding," to be run, &c.; and it is decided in *Thrasher* v. *The State*, 6 Blackf. 460, that the averment in the indictment as to the kind of animal suffered to be run is descriptive of the offence, and must be proved as laid. The description in an affidavit for the prosecution of such an offence, before a justice of the peace, of the kind of animal suffered to be run, is as binding upon the prosecutor, and as material, as is that in an indictment, and would necessarily have to be sustained by proof. In either of these cases, therefore, to admit parol evidence that the conviction was, in fact, for suffering a different kind of animal to be run from that specified in the record, would be contradicting the record in a material point. This cannot be done.

Per Curiam.—The judgment is affirmed with costs.

M. L. Bundy and *W. Henderson*, for the plaintiff.

WRIGHT and Others *v.* BROWN.

4 95
151 595
151 614
151 617
151 618

The owners of a steamboat, knowing the manner in which a flat-boat is fastened to the shore, are liable for the loss of the flat-boat and cargo occasioned by waves created by the steamboat while running out of the usual channel for such boats, under a full head of steam, near to the flatboat—if the persons in charge of the flat-boat have used all proper efforts to save the boat and diminish the damage occasioned by the waves.

It is no answer to an action brought for the loss, under such circumstances, that if the flat-boat had been tied to the shore in an ordinarily secure manner, it would have escaped injury.

May Term, 1853.

WRIGHT v. BROWN.

Wednesday, May 25.

ERROR to the *Jefferson* Circuit Court.

PERKINS, J.—*Brown*, the owner of a flat-boat, brought an action against *Wright* and others, the owners, &c., of the steam-boat *Wisconsin*, alleging that while his, said *Brown's*, flat-boat was moored at the wharf in the city of *Madison*, on the *Ohio* river, laden with a cargo of, &c., of the value, &c., the defendants carelessly ran said steam-boat past said flat-boat, under a much greater head of steam than usual, and out of the ordinary channel, thereby producing waves of such violence, and so near to said flat-boat, that it was forced from its moorings, thrown upon a post on the shore, broken, sunk, &c., to the damage, &c.

Plea, the general issue. Jury trial. Verdict and judgment for the plaintiff for 240 dollars, and costs.

The evidence upon the record shows that *Brown* had a flat-boat at the *Madison* wharf, laden with hollow stone-ware; that said boat was moored with "one anchoring line, having an anchor attached, quartering up and out into the river from the bow, a head-line almost straight up the river, and a breast-line to the shore," and was in charge of one *Montgomery;* that said boat had been lying at the wharf for some days; that on the 17th of *December*, and while said flat-boat was so lying at the *Madison* wharf, the steam-boat *Wisconsin*, a new boat just finished at *Madison*, and lying at the wharf about one hundred yards below the flat-boat, left said wharf to make her first trip, backed down some one hundred or two hundred yards, and then came up under a full head of steam, out of the customary channel for boats, and near the *Indiana* shore, in order, as the evidence is, "to show off," whereby the waves were produced which occasioned the destruction of the flat-boat and cargo in question. It further appears that everything was done that could be done, after the injury occurred, to save the flat-boat and cargo.

The circuit judge, in his instructions to the jury, said, "I hold it to be the duty of the officers of steam-boats when arriving at, departing from, or passing by, a landing at which flat-boats are moored, to run and manage their boats with a due regard to the safety of the flat-boats.

They ought, at such times, to run their boats with less velocity than usual, and carefully avoid approaching or passing so near to the flat-boats as to endanger their safety. On the other hand, flat-boats ought not to be moored so near to the usual place of steam-boat landing as to render it inconvenient for steam-boats to get in or out without danger to the flat-boats.

"If you are satisfied from the evidence that the officers of the *Wisconsin* were guilty of gross carelessness in running their boat with greater velocity and nearer the shore than was proper under the circumstances, and so caused the plaintiff's boat to sink; and are also satisfied that if they had run their boat with reasonable velocity, and at a proper distance from the shore, and with reasonable care, the plaintiff's boat would not have been injured; you ought to find for the plaintiff, whether his boat was fastened to the shore and managed with ordinary care and skill or not, for in such a state of circumstances the loss was occasioned by the improper manner of running the *Wisconsin*, and would not have occurred but for that, and is, therefore, wholly attributable to that cause."

To this instruction the defendant excepted.

We shall consider this case as one of collision between the vessels; for it must be the same thing in principle, whether the steam-boat ran upon the flat-boat, or forced some other object upon it, to produce the injury; and we must consider the instruction in its application to the case in which it was given, as presented by the evidence, all of which is upon the record.

We have then, in short, this state of facts. A flat-boat is moored at the *Madison* wharf, perhaps not as securely as is customary (though the preponderance of evidence is that it was); the steam-boat *Wisconsin* is lying at the same wharf, and had been so long, and so near to the flat-boat, that she must be presumed to know the manner in which said boat was fastened to the shore. The steam-boat voluntarily leaves the wharf, backs down to a point some three hundred yards below the flat-boat, and then comes up, contrary to the usual custom of boats on the

May Term, 1853.

WRIGHT v. BROWN.

river, and wrongfully, under a full head of steam, out of the regular channel, and near to the flat-boat, producing a collision or waves by which said flat-boat is destroyed, though all proper efforts are made, at the time, by the person in charge, to save it and to diminish the damage occasioned by the collision; and the question is, can the owners of the steam-boat say, in answer to a suit for damages, that if the flat-boat had been tied to the shore in an ordinarily secure manner, it would have escaped injury? It seems to us that they cannot.

By the maritime law, where a collision happens and both boats are in fault, the injured or the more injured boat recovers of the other an amount that will equalize the loss between them. At common law, however, the general principle is, that a party cannot recover anything for an injury which his own fault directly contributes to produce. *Halderman* v. *Beckwith*, 4 McLean 286. *Strout* v. *Foster*, 1 How. U. S. R. 89. But there is a class of cases establishing this doctrine, that where the wrongful act immediately causing the injury, is the work and through the fault of one party alone, he shall be liable for it, even though the damage such act occasions may be increased or entirely result through some previous neglect of the other party in respect to the thing injured; and especially if the party committing such wrongful act knows, at the time, of the previous neglect of the opposite party. We notice a few of these cases. *Davies* v. *Mann*, 10 Mees. and Welsby, 546, was this: The plaintiff turned his donkey, fettered, into the public highway, which was an illegal act. "The defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after." It was proved that the driver of the wagon was, at the time, some little distance behind the horses. It was held that the plaintiff was entitled to recover for the ass, notwithstanding his own wrongful act in turning it fettered into the highway. "Were this not so," said *Parke*, B., "a man might justify the driving over goods

left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

Brownell v. *Flagler*, 5 Hill, N. Y., 282, was as follows: *Flagler* was passing with a flock of about twenty lambs, which he had sold to a drover. A lamb belonging to *Brownell* was in the highway, and joined the flock of *Flagler*, going with it to the yard of one *Sherman*, where the flock was left for the drover, who, the next day, took away the flock, *Brownell's* lamb being in it, to market. *Flagler* was held liable to pay *Brownell* for his lamb, though he did not sell it to, or receive anything from, the drover for it. *Bronson*, justice, in delivering the opinion of the Court, said, that there might "have been some slight degree of negligence on the part of the plaintiff in allowing his lamb to escape into the highway," but still the defendant knowingly drove away the lamb, when he might have separated it from his flock, and that he was in fault for not doing it.

Inman v. *Galt*, 7 B. Monroe 538, was a case of collision between two flat-boats, at the wharf at *Louisville*. The defendant carelessly ran against the plaintiff's boat, doing serious damage. The defendant contended that he ought not to be liable for said damage, because the boat injured was a weak one, and that, had it been a boat of ordinary strength, the collision would not have injured it. *Marshall*, C. J., in delivering the opinion of the Court, says: "The weakness of the plaintiff's boat, as it rendered it the more liable to injury from collision, called for greater precaution on the part of those who knew the fact. If the defendant did not know it, he was still bound to use the means proper to prevent collision, and if it occurred without the use of such means on his part, and without fault on the part of the plaintiff, the greater damage consequent upon the weakness of the boat, must fall upon the defendant." So we say in this case, as to any increased damage resulting from the flat-boat not being tied as firmly to the shore as it might have been. In the *New Haven Steam-boat, &c., Co.* v. *Vanderbilt*, 16 Conn. R.

May Term, 1853.

THE STATE v. SHOEMAKER.

420, a case of collision, where the defendant contended the plaintiff was in fault in not showing lights, the collision having occurred in the night, the Court say: "While, on the one hand, a party shall not recover damages for an injury which he has brought upon himself, neither shall he be permitted to shield himself from an injury which he has committed, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and, even then, it would seem a party is bound to use common and ordinary caution to be in the right. Lord *Ellenborough*, in *Butterfield* v. *Forrester*, 11 East 60, said, 'a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.' "

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

J. G. Marshall and *J. Sullivan*, for the plaintiffs.

W. M. Dunn and *A. W. Hendricks*, for the defendant.

THE STATE v. SHOEMAKER.

An indictment against a licensed grocer, founded on sec. 95, ch. 53, R. S. 1843, for vending spirituous liquor to a minor, alleged that the liquor was sold to the minor "without the consent of his parent," omitting the words "or guardian." *Held*, that a motion to quash for this omission was improperly sustained.

Thursday, May 26.

ERROR to the *Posey* Circuit Court.

STUART, J.—Indictment against a licensed grocer for vending spirituous liquor to a minor, without the consent of his parent, &c.

Motion to quash in the Circuit Court sustained.

The indictment professes to meet the requisitions of

s. 95, c. 53, of the R. S. 1843. It is objected that the language of that section is not followed. The statute reads, that if a licensed grocer, &c., "sell, &c., to a minor, without the consent of his parent *or guardian*." The indictment runs, "without the consent of his parent," omitting the words, "or guardian."

It is possible that one or both of the minor's parents were dead—possible that he had a guardian. But the presumption in favor of the parent being alive and competent to discharge the duties which that position imposes, may be fairly indulged. It is not necessary that the indictment should negative every conceivable fact which might change the character of the offence. 7 Blackf. 468. In this case, as in that, the objection may possibly apply to the evidence, and avail the defendant on the trial. But there is sufficient on the face of the indictment to put the defendant to answer. The motion to quash should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. L. Robinson, for the state.

J. Pitcher, for the defendant.

Davis and Another *v.* Stonestreet.

A tender of money in a handkerchief, with a statement of the amount and kind, is a sufficient tender.

The maxim in relation to mortgages is, that "once a mortgage always a mortgage."

Courts of Equity do not favor conditional sales; and they will pronounce that a mortgage which, at law, would be a conditional sale. They are disposed to consider every deed, whatever be its form, which resolves itself into a security for the performance of any act, as a mortgage.

Where a party advanced money to another, and for his security took an instrument from the latter, from the language of which it was doubtful

May Term, 1853.

DAVIS v. STONESTREET.

whether a conditional sale of land or a mortgage was intended, but took no note for the money advanced, *held*, that the omitting to take the note was not conclusive that a conditional sale was intended.

Where from the language of an instrument it is difficult to determine whether a conditional sale or a mortgage of lands was intended, if the price was grossly inadequate, it will be construed to be a mortgage.

Thursday, May 26.

ERROR to the *Miami* Circuit Court.

STUART, J.—*Stonestreet* filed his bill in chancery against *Davis*, *Crispin*, and others, to redeem land alleged to have been mortgaged by him to *Crispin*. Final hearing on the pleadings, depositions, &c., and decree in accordance with the prayer of the bill.

Stonestreet was the owner of a canal-land certificate, on which he had paid about 206 dollars. There was still a balance due thereon at the land-office. In *December*, 1846, *Crispin* paid into the office, on the land, 46 dollars and 89 cents, and to *Stonestreet*, for the alleged purpose of paying his expenses to *Ohio*, 16 dollars and 36 cents. To secure *Crispin*, *Stonestreet* transferred the canal-land certificate, duly assigned—the assignment absolute in terms. But concurrently therewith, *Crispin* and *Stonestreet* executed the following agreement. After describing the parties, and using language implying a penalty, though there is none, it proceeds: The condition of the above agreement is such, that whereas the above-named *Crispin* hath this day paid into the land-office, at *Peru*, the sum of 46 dollars and 89 cents, for *Stonestreet*, together with the sum of 16 dollars and 36 cents, cash in hand now paid, the receipt of which *Stonestreet* hereby acknowledges, making in all the sum of 63 dollars and 25 cents, for and in consideration of which, said *Stonestreet* hath this day assigned *Wabash* and *Erie* canal-land certificate, No. 4314; now be it known, and it is further agreed by and between the aforesaid parties, that if the said *Stonestreet* shall well and truly pay, or cause to be paid, unto the said *Crispin*, the sum of 63 dollars and 25 cents, on or before *April* 1, 1847, then the said *Crispin* is to assign the said certificate to the said *Stonestreet*; but should the said *Stonestreet* make default, then the said certificate to be and remain

the property of the said *Crispin*. Given under our hands and seals, this 4th day of *December*, 1846. *Peter Crispin*, [seal]. *Henry R. Stonestreet*, [seal].

On the 8th of *January*, 1847, *Stonestreet* and *Davis* met in the state of *Ohio*, and *Stonestreet* appointed *Davis* his agent in relation to the land, giving him a power of attorney to sell and pay *Crispin*.

On the 17th of *April*, 1847, *Crispin* assigned the certificate to the defendant, *Helm*, for 63 dollars and 25 cents, the amount due without interest, taking from *Helm* an obligation similar to that he had given, by which the time for *Stonestreet* to redeem was extended until *September* 1, 1847. This was done with the consent of *Davis*, and *Crispin* delivered *Helm's* obligation to *Davis*, as the agent of *Stonestreet*. The avowed object of *Helm* was to save a doctor bill he had against *Stonestreet*. On the 30th of *August*, 1847, *Davis* procured *Helm* to assign the certificate to him for 87 dollars, which included the 63 dollars and 25 cents, the doctor bill, interest, exchange, &c. *Davis* also delivered the obligation given by *Helm* to *Crispin*.

Shortly after this transfer, *Davis* wrote to *Stonestreet*, who was still in *Ohio*, that the certificate was sold, and could not be redeemed for less than 150 dollars; but he was cautiously silent as to the name of the purchaser. In the fall of 1847, *Stonestreet* returned, tendered to *Davis* the 63 dollars and 25 cents, and interest, and demanded an assignment of the certificate. He held the money in a handkerchief, telling *Davis* the amount and kind of money, and offering it to him. By his amended bill, the tender was continued, and the money brought into Court.

The defendants, in their several answers, admit the facts very much as they are alleged in the bill; but they deny the legal conclusions. They deny that the assignment and defeasance taken together, constitute a mortgage, and insist that the transaction was a conditional sale.

It appears that the value of the land, on the 1st day of *April*, 1847, was from 500 to 600 dollars.

Passing over the obliquity of *Davis's* course as an agent, there are but two questions arising in the case:

May Term, 1853.

DAVIS v. STONESTREET.

1. Was the tender sufficient?

2. Was the assignment to *Crispin* a mortgage or a conditional sale?

On the first question, the authorities are explicit. A tender of money in a bag, untold, is sufficient. Buller's N. P. 155.—3 Steph. N. P. 2602. *Davis* himself regarded it as a tender. His version to one of the witnesses is, that *Stonestreet* had been at his house that day, and offered to pay the amount due on the land certificate in specie; but that he, *Davis*, wanted a settlement of *all* the matters between them. In amount, too, the tender was sufficient. *Helm's* doctor bill was no lien on the land; nor were the other items of exchange, &c., claimed by him and *Davis*. On these, their remedy, if any, was against *Stonestreet* at law. All that any of them could hold the land for was the 63 dollars and 25 cents and interest, if the transaction was really a mortgage. If it should turn out to be a conditional sale, the tender and all *Stonestreet's* efforts to redeem, were labor lost.

On the second question it is very difficult to deduce any clear, well-defined rule from the books. There are numerous criteria recognized by the courts to distinguish between a conditional sale and a mortgage. The price, the circumstances, the situation of the parties, &c. But these and other considerations, which have controlled the decisions of courts of equity, are so blended in the reported cases, setting aside, at times, the express agreements of the parties, that it is difficult to deduce a rule at once safe and comprehensive. The element which is regarded as conclusive in one case, is wholly wanting in another; and each case seems to be decided very much on its own peculiar circumstances. On one point the authorities are all agreed, that "once a mortgage always a mortgage." If, says *Savage*, C. J., the transaction was a mortgage in its inception, no subsequent event, whatever, can make it more—not even the agreement of the parties to change it to an absolute conveyance, will be regarded in chancery. *Clark* v. *Henry*, 2 Cow. 324.

The leading case on the side of conditional sales, and which has been followed by the state courts, is *Conway's Executors* v. *Alexander*, 7 Cranch 219. This case in *Cranch* is not, as will be seen in the sequel, inconsistent with the case in *Cowen*, but only distinguished as an elaborate summary of the doctrine of conditional sales.

It appears that courts of equity do not regard conditional sales favorably. They will pronounce that a mortgage which at law would be a conditional sale. They are disposed to consider every deed, whatever be its form, which resolves itself into a security for the performance of any act, as a mortgage. 2 Sumner 486. In *Conway's Executors* v. *Alexander*, *Marshall*, C. J., lays down the rule, that the policy of the law and the leaning of courts are against conditional sales; and doubtful cases have generally been considered mortgages.

Such has become the settled rule of construction. In *Strong* v. *Stewart*, the defendant set up a sale by assignment in absolute terms of all the right, &c., of the party to the land, and denied the fact of a loan. But he admitted, in his answer, that after the assignment was made, he gave the party time to return the money and take back the assignment. *Kent*, Ch., says, "On the strength of the authorities, I shall decree an existing right in the plaintiff to redeem. The admissions in the answer are sufficient to presume a mortgage against the absolute terms of the assignment." 4 J. C. R. 167. A deed absolute, with agreement to redeem in a year, is in equity a mortgage. Saxton's Ch. R. 534. An assignment of a contract for the purchase of land conditioned to re-assign on the payment of a debt, is a mortgage. 1 Paige 617.—6 *id.* 480.—8 *id.* 243.—6 Gill and J. 275.—1 Blackf. 305, and n. 2. A deed and defeasance taken together, amount to a mortgage. 3 Blackf. 51.—6 *id.* 113.

Some stress is laid on the fact that there was no note taken by *Crispin* from *Stonestreet* for the repayment of the money. This, though an element for consideration in doubtful cases, is by no means conclusive. It is not ne-

May Term, 1853.

DAVIS v. STONESTREET.

cessary to a mortgage that there should be a covenant to repay the money. 2 Sum. 486.

There is one feature in the defeasance conclusive as to the character of the transaction. That is the price. If it was a conditional sale, *Stonestreet* derived no benefit from the 46 dollars paid into the land-office. That payment inured to the benefit of *Crispin* himself. On this hypothesis, *Stonestreet* sold for 16 dollars, land worth 600 dollars, a fact sufficient of itself to stamp the character of the transaction. Thus in 8 Paige, *supra*, *Walworth*, Ch., held that a deed absolute, accompanied by an agreement to reconvey, will be considered a mortgage, especially where there is great inadequacy of price. So, gross inadequacy of price will be sufficient to show that a deed, absolute in form, is only a mortgage. 2 Ired. Ch. 94. In 7 Cranch, *supra*, great stress is laid on the fact that *Lyles* paid a full price for the property. In the light of these authorities, 16 dollars for property worth 600 dollars, is too grossly inadequate to support the hypothesis of a conditional sale.

We are referred, with great confidence on the part of the plaintiffs in error, to the case of *Conway's Executors* v. *Alexander*. We have already alluded to this case on two points, viz., the rule of construction in doubtful cases, and the recognition of price as a consideration in giving character to a conveyance.

In that case, it is true, the conveyance was declared to be a conditional sale. Yet, when analyzed and compared with that before us, the decision in *Cranch* will be found to make strongly against the party citing it. It recognizes principles fatal to the case he has made. It has some similarity to the one now before us, in the following particulars: There was no previous debt; no conversation about a loan or a mortgage, and no separate note or obligation to repay. Yet these are but a small and comparatively unimportant part of the broad basis on which the decision in *Cranch* rests.

That case is strongly distinguished from this in the following particulars:

The deed, says the Court, is not conclusive either way.

The conveyance to trustees to be by them conveyed to *Lyles*, is only evidence of the intention of the parties to avoid the *forms* of mortgage.

Lyles considered it a purchase; *Alexander* himself a conditional sale.

Conway, the purchaser from *Lyles*, under the immediate eye of *Robert Alexander*, made partition of the land with *Charles Alexander*, without objection from *Robert*.

During the space of nearly three years, in daily sight of *Robert Alexander*, *Conway* made large and valuable improvements on the land.

In his will, while disposing of all his other property, *Robert Alexander* makes no allusion to this land.

The price paid by *Lyles* to *Robert Alexander* was but a trifle below the real value.

The deed from the trustees to *Lyles*, after the time to redeem had elapsed, was, as expressly found by the Court, very probably made with *Robert Alexander's* consent.

In all these marked and conclusive particulars—the deed, the partition, the improvements, the price, the long acquiescence, the will, and the presumed consent to the trustee deed—the case in *Cranch* is distinguished from that at bar. The decision there is not placed upon any one of these considerations, but on the force of all combined. And yet the opinion discloses that some of the judges hesitated. Applying the principles recognized in that case to this, and it is a strong authority favorable to the transfer here being a mortgage, and not a conditional sale.

Per Curiam.—The decree is affirmed with costs.

D. D. Pratt, for the plaintiffs.

A. A. Cole, for the defendant.

May Term, 1853.

HUNT v. ADAMSON.

HUNT v. ADAMSON.

The assignee of a joint promissory note who had sued the makers, might, under the R. S. 1843, upon the service of the summons upon one and a return of "not found" as to the other, suggest such return, obtain a judgment against the maker served, and afterward sue the other maker upon the note.

Thursday, May 26.

APPEAL from the *Randolph* Circuit Court.

DAVISON, J.—Debt by the appellee against the appellant.

The declaration alleges, *inter alia*, that on the 2d of *February*, 1836, the said *Basil Hunt* and one *Miles Hunt*, executed their joint promissory note to *Griffin* and *Luckey* for 315 dollars and 25 cents; that after the note became due, viz., on the 10th of *September*, 1840, at a regular term of the *Randolph* Circuit Court, *Griffin* and *Luckey* recovered a judgment on said note against *Miles Hunt*, for the amount of the note and interest then due; that before the term at which said judgment was rendered, *Griffin* and *Luckey* had sued out a writ against *Miles Hunt* and the said *Basil Hunt*, which was, by the sheriff of, &c., returned executed on *Miles Hunt*, and not found as to *Basil Hunt;* which return was, prior to the taking of said judgment, entered upon the records of said Court; that on the 9th of *January*, 1847, *Griffin* and *Luckey* assigned the note to the said *Adamson;* and the note is still unpaid, &c.

Demurrer to the declaration overruled. Judgment for the plaintiff below.

The appellant contends that the note, as to him, was extinguished by the judgment against *Miles Hunt*.

At common law, where two persons are jointly liable for a simple contract debt, a judgment against one is an extinguishment of the debt as to the other.

There is, however, a statutory provision which enacts that "when any writ shall be returned 'executed' as to one or more defendants, and 'not found' as to others, the plaintiff may suggest such return upon the record, and proceed to final judgment and execution against the de-

fendants upon whom the writ has been 'executed,' and may, at any time thereafter, proceed against those 'not found,' by action against them jointly or severally." R. S. 1843, c. 40, s. 31. This case is within the letter of the section just recited. The writ had been returned "executed" as to *Miles Hunt*, and "not found" as to *Basil Hunt*, the defendant below; and a suggestion to that effect had been made upon the record. The holder of the note was, therefore, expressly authorized to proceed against him in this action.

We are referred to *Nicklaus* v. *Roach*, in this Court, *November* term, 1851 (1). In that case *Dapput*, one of the partners of the firm of *John Nicklaus & Co.*, had been sued on a note given by him for a partnership debt, and a judgment was obtained against him on the note. *Nicklaus*, the other partner, subsequently executed a note for the same debt, and was then sued on his note. The Court held that the recovery of a judgment against *Dapput* for the partnership note, discharged *Nicklaus* from all liability for that debt. It is evident that the case referred to is in no respect applicable to the one before us. No joint action had been commenced against the partners; consequently, there was no return of "not found" as to *Nicklaus*. We think the demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

T. J. Sample, for the appellant.

D. Kilgore, for the appellee.

(1) 3 Ind. R. 78.

SCHWARTZ *v.* OSTHIMER.

The plaintiff having by replication to the plea of the defendant, alleged that the defence set up in the plea, had been pleaded by the defendant

May Term, 1853.

SCHWARTZ v. OSTHIMER.

in a former suit between them, and that the matter of the plea was determined in the former suit, and having proved the filing of such plea in the former suit, that it had been lost or mislaid and could not, after diligent search, be found, offered to give parol evidence of its contents. *Held*, that such evidence was admissible.

Thursday, May 26.

ERROR to the *Hamilton* Circuit Court.

DAVISON, J.—This was an action on the case by *Osthimer* against *Schwartz*, before a justice of the peace. The justice gave judgment for *Osthimer*, and *Schwartz* appealed to the Circuit Court.

The declaration contains four counts. The first, second and third counts are in substance the same. They allege that the plaintiff bargained with the defendant, at his request, to buy of him a certain horse for 30 dollars; and that the defendant, by falsely and fraudulently warranting said horse to be sound and a good work horse, and that he would be a good work horse for seven or eight years to come, sold said horse to the plaintiff for said sum of 30 dollars, for which the plaintiff gave to the defendant his note, payable on the 25th of *December*, 1849; whereas, &c., the said horse was, at the time of said sale, unsound, diseased, and was not a good work horse; but was restive, ungovernable, and worthless. And the said horse afterward, on the 12th of *October*, 1849, died of the unsoundness aforesaid, &c.

The fourth count states that the defendant professed to have skill as a veterinary surgeon, and to be able to bleed and doctor sick and diseased horses; and by such profession induced the plaintiff to permit and suffer him to bleed said horse; and that he did bleed said horse so negligently and unskillfully, that said horse, in consequence thereof, died, and was wholly lost to the plaintiff, &c.

The defendant pleaded two pleas. 1st. Not guilty. 2d. That the defendant on the —— day of ——, 1850, impleaded the said plaintiff before one *Joseph Carlin*, a justice of the peace, in an action of debt for the purchase-money agreed to be given by the plaintiff for the identical horse mentioned in the declaration; and that the plaintiff

appeared to said action and filed his general and special pleas, wherein he set up as a defence the very identical matters, and each and every of them, now set forth in the declaration in this present suit; and that said matters were considered and admitted by said justice as proper and legal matters of defence in that suit, and the justice, upon the merits, gave judgment in favor of the defendant for 30 dollars and costs, &c., which judgment is in full force, &c.

In the Circuit Court this cause was submitted to a jury. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

Upon the trial *Schwartz* proved a judgment against *Osthimer* in an action of debt, as stated in his plea; and also, that in said action *Osthimer* had filed from three to five pleas. And *Schwartz* having shown, by his own affidavit and other evidence, that the said pleas were lost or mislaid, so that, after diligent search, they could not be found, he moved the Court for permission to prove the contents of the pleas, which motion the Court overruled. He then moved the Court to permit the justice to amend his docket so as to show the filing of the pleas. This motion was also overruled. Whereupon he moved the Court to permit him to prove by *Carlin*, the justice, and other competent witnesses, that the very identical matters set forth in the declaration in this present suit, were set up in said pleas, and were by the justice, upon the trial of said action of debt, fully tried, adjudged and determined; but the Court overruled said motion.

The question presented by the record is, was it competent for the plaintiff in error, (having proved the filing of the pleas, that they were lost or mislaid, and could not, after diligent search, be found), to give parol evidence of their contents?

In *Jackson* v. *Cullum*, 2 Blackf. 228, it was held that, "If an instrument of writing, or even the record of a judgment, be lost or destroyed, the contents may be proved by parol." In that case, the Court says, "On the subject of evidence, the general rule is that the best at-

May Term, 1853.

HILL v. THE STATE.

tainable evidence shall be adduced to prove every disputed fact." The effect of this rule is, that when from the nature of the transaction, superior evidence may be presumed to be within the power of the party, that which is inferior will be excluded. But when it is manifest that evidence of a higher degree is not within the power of the party, that of the lower degree will be received; and the general rule never excludes the best evidence that can be produced. 1 Stark. Ev. 391.

We think the record presents a fair case for the admission of secondary evidence. The loss of the pleas was clearly shown, and it appears to us that parol evidence of their contents should have been admitted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. H Voss and *R. L. Walpole*, for the plaintiff.

W. Garver, for the defendant.

---

4 112
165 98

HILL v. THE STATE.

The prosecuting witness on a complaint for bastardy, may be compelled to testify whether about the time she has alleged that the child was begotten, any person besides the defendant had carnal intercourse with her.

If the complainant denies in her testimony that about that time she had carnal intercourse with another person than the defendant, a witness may be compelled to testify whether about that time she had carnal intercourse with him.

Thursday, May 26.

ERROR to the *Henry* Circuit Court.

PERKINS, J.—This is a case of bastardy. The defendant was convicted in the Circuit Court.

On the trial, *Sarah B. Mendenhall*, the mother of the bastard child, and the relator in the prosecution, testified

that said child was begotten by *Charles Hill*, the defendant in the prosecution, on the 10th of *July*, 1850, and that no other person had sexual intercourse with her about that time. The defendant then introduced a witness, *William Sowash*, who testified that during said month of *July*, he "sat up" with said *Sarah* several nights, and, upon being asked whether he did not have sexual intercourse with her about the 10th of said month, the Court informed the witness that as his answer to that question might tend to his disgrace, he need not reply to it unless he was willing to do so; whereupon the witness refused to answer, and the defendant excepted.

The ruling of the Court upon this point presents the only question in the cause for our consideration.

The complaining witness, *Sarah B. Mendenhall*, had been asked whether any person other than *Hill* had had carnal connection with her about the 10th of *July*, 1850, and had answered the question; and the law seems to be now settled that she was liable to be compelled to answer it, though it was one the answer to which might tend to her disgrace. 1 Greenl. Ev. s. 454, n. 1. Such has been recognized to be the law by this Court. *Walker* v. *The State*, 6 Blackf. 1.

Now, this witness, *Mendenhall*, was liable to be compelled to answer said question, either to lay the foundation for her impeachment as a witness, or because the answer might furnish evidence material to the point in issue in the cause, viz., the paternity or fathership of her bastard child, or for both these reasons.

If she was compellable to answer for the first reason, then the defendant should have been allowed to coerce the testimony of those by whom the impeachment could be sustained, notwithstanding it might disgrace them; otherwise his right to lay the foundation for such impeachment might be useless. If she was compellable to answer for the second reason, then, we say, the testimony of those who might have had intercourse with her at the particular time named, would have been equally pertinent and material to the issue, and the defendant should have been

May Term, 1853.

BANKUS v. THE STATE.

allowed the benefit of it; and if for both of said reasons, then for both reasons above assigned, should the testimony sought and refused in this case have been given.

We think the Court erred in not compelling *Sowash* to answer the question put to him, and, for this reason, the judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

E. B. Martindale, for the plaintiff.

W. Grose, for the state.

BANKUS and Others *v.* THE STATE.

Where, by previous concert, three or more persons, by their voices or a trumpet, make a great noise tumultuously, in the night-time, in the vicinity and within the hearing of persons not participating with them, the act, under the R. S. 1843, is a riot.

The fact that the witnesses who heard the noise were not alarmed by it, does not change the nature of the offence.

Neither does the circumstance that those who made the noise were in a good humor at the time.

A defendant indicted for a crime, cannot exempt himself from punishment by showing that it was the custom of the country to do the act which constituted the crime.

Thursday, May 26.

ERROR to the *Henry* Circuit Court.

PERKINS, J.—Indictment for a riot. Jury trial, conviction, motion for a new trial overruled, and judgment against the defendants.

The bill of exceptions in the case states the substance of the evidence given as follows: "*Jesse Bankus*, *Lewis Simpson*, *William Woods*, and *William McShirely*, four of the defendants, were on trial, and three witnesses were examined on the part of the state, (one of whom was engaged in the alleged riot with the defendants), whose tes-

timony tended to prove that on a certain evening, within a year before the finding of said indictment, at the county of *Henry*, the above-named defendants were at a certain place in said county, called *Chicago*, (there being no evidence to prove that they had assembled at said place by previous concert or arrangement, for any purpose whatever, except the facts that they were all present without any known business, and that they lived in different parts of the neighborhood); that there had been an infair at the house of one *Jacob Wise*, in said *Chicago*, whose house was situated on or near the public highway; that the defendants, with one exception, were young men, one of whom went to a neighboring house and borrowed a horn, with which they marched back and forth along the highway, sometimes blowing said horn and singing songs, but not vulgar ones, before the house of said *Wise*, and north and south of it, and hallooed so that they could be heard near a mile distant, as certain persons, not witnesses, had informed said *Wise;* and that they continued on the ground, thus acting, till one or two o'clock in the morning. But said witnesses all concurred in stating that the defendants were all in good humor, and used no violence further than above set forth; that they had no guns or weapons of any kind, made no threats or attempts at force of any kind; that the witnesses were not in the least alarmed, and feared no danger of any kind, and were in no way disturbed, except that *Jacob Wise* stated that he went to bed about nine o'clock, and was awakened occasionally by the hallooing in the road, and that a pedler, who put up at the house of said *Wise* that night, (it being a public house), inquired if there were a lock and key to the stable in which his horses were kept; and that said *Wise*, at the instance of said pedler, locked the stable;" which was all the testimony given in the cause.

The question is, whether, upon the foregoing evidence, the jury were authorized to find the defendants guilty of a riot.

The R. S. of 1843, enact, p. 973, that "if three or more persons shall actually do an unlawful act of violence,

May Term, 1853.

BANKUS v. THE STATE.

either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot." The R. S. of 1852, vol. 2. p. 425, thus define a riot: "If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot."

A great noise in the night-time, made by the human voice or by blowing a trumpet, is a nuisance to those near whom it is made. The making of such a noise, therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is, by the statute of 1843, a riot. All these facts exist in the present case. Here was a great noise, heard a mile, in the night-time, made with human voices and a trumpet, in the vicinity of inhabitants. The requirements of the statute for the making out of the offence are filled. The noise was also made tumultuously. The act itself involves tumultuousness of manner in its performance. But it is said, here was no alarm or fear. The statute defining the offence says nothing about alarm or fear. In this case, however, it was only the witnesses who were not alarmed. Others within the distance of the mile in which the noise was heard, and who were not present to observe the actual condition of things, may have been, and doubtless were, alarmed; and the pedler was afraid his horses would be stolen.

It is said the rioters were in good humor. Very likely, as they were permitted to carry on their operations without interruption. But with what motive were they performing these good-humored acts? Not, certainly, for the gratification of *Wise* and his family. They were giving them what is called a charivari, which *Webster* defines and explains as follows: "A mock serenade of discordant music, kettles, tin-pans, &c., designed to annoy and insult. It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult."

Again, it is urged that these defendants were but acting in accordance with the custom of the country. But a cus-

tom of violating the criminal laws will not exempt such violation from punishment. In the case of *The State of Pennsylvania* v. *Lewis, et al.*, Add. R. 279, it appeared that on the 5th of *November*, 1795, there was a wedding at the house of one *John Weston*. The defendants in said case were there without invitation, were civilly treated, and, in the evening, when dancing commenced, began a disturbance in which, during the evening, *Weston* was so seriously injured that, on the third day after, he died. On the trial of the indictment against said defendants, *Campbell*, *Pentecost*, and *Brackenridge*, in their argument, said, "These men did nothing more than an usual frolic, according to the custom and manners of this country. There was no intention of hurt, no design of mischief, in which the malice, which is a necessary ingredient of murder, consists." But the argument did not prevail; and the Court said, "If appearance of sport will exclude the presumption of malice, sport will always be affected to cover a crime." The defendants were convicted of murder in the second degree.

The case before us we regard as a plain, but not an aggravated one, of riot, and the judgment below must be affirmed. The defendants were fined but 3 dollars each.

Per Curiam.—The judgment is affirmed with costs.

C. H. Test, for the plaintiffs.

D. S. Gooding, for the state.

Doe on the demise of Murphy and Another *v.* Hayes and Another.

The issuing of an alias *fi. fa.* while the levy under the first is undisposed of, cannot affect the lien of the judgment.

Where the land of an execution-defendant has, during his lifetime, been levied upon by a *fi. fa.*, a *venditioni exponas* may issue after his death, and the land may be sold thereon.

May Term, 1853.

Doe v. Hayes.

Friday, May 27.

ERROR to the *Shelby* Circuit Court.

Stuart, J.—The case was submitted to the Court; finding and judgment for the lessees of the plaintiff.

It appears from an agreed state of facts, that on the 27th of *August*, 1841, *Jesse Scott* recovered judgment, by confession, for 200 dollars, on a note dated *June* 18, 1840, against *Lockhart* and others. At the time of the recovery, *Lockhart* was the owner in fee of the land in controversy. On the 5th of *August*, 1842, a *fi. fa.* issued on the judgment, was levied on the tract of land in question, as the property of *Lockhart*, and was returned without sale, by order of the plaintiff, *Scott*. In *March*, 1843, an alias *fi. fa.* was issued, which was also levied on the same tract of land, and returned no sale for want of bidders. In *March*, 1844, *Jesse Scott*, the execution-plaintiff, died; and in *September*, 1845, a *venditioni exponas* issued, reciting the first *fi. fa.* and the sheriff's levy and return thereon, and directing the officer to sell, &c. At this point there is great confusion of dates in the "agreed case." The sale to the *Murphys* is stated to be in *October*, 1847, the return of the sheriff in *July*, 1847, and the deed to the purchasers in *May*, 1846. We may still presume that the sale, the deed, and the return, followed each other in proper succession. The sheriff's deed to the *Murphys* was recorded in *May*, 1846. These proceedings under the *Scott* judgment, constitute the chain of title on the one side.

On the other, it appeared that in *August*, 1842, a year after the recovery of the *Scott* judgment, *Lockhart* mortgaged the land in dispute, together with other lands, to *Hayes* and *Ferris*. From this mortgage the defendants trace their title. It is not necessary to state the several steps of foreclosure, &c. The priority of the lien of the *Scott* judgment does not admit of controversy. The issuing an alias *fi. fa.* while the levy under the first execution was undisposed of, might be an irregularity—perhaps a nullity; but could not affect the lien of the judgment. 1 Ohio R. 458. The lien remains until the judgment is satisfied, or the property bound by it is disposed of.

The only remaining question relates to the sale on the

venditioni exponas, after the death of the execution-plaintiff. A *fi. fa.* levied on land in the lifetime of the execution-defendant, may be proceeded in, and the land sold after his death. *Wolf* v. *Heath*. 7 Blackf. 154. So if the execution-plaintiff die after the issuing of a *fi. fa.*, the writ may still be executed. *Murray* v. *Buchanan*, 7 Blackf. 549. The rule to be deduced from these decisions is, that when the execution of the writ is begun in the lifetime of a sole plaintiff or sole defendant, the officer may complete it after the death of either party. The sale in the present case, though on a *venditioni exponas* issued after the death of *Scott*, comes fairly within the rule. For the *vendi.* is only the execution of what had been left to be done under the *fi. fa.* It is not a new command to levy, but only to dispose of a levy already made. The officer is ordered to complete, under the *vendi.*, what he had begun under the *fi. fa.* The *vendi.* relates back to the *fi. fa.*, and to the proceedings had thereon. The power of the officer under the *vendi.* commences precisely where his action under the *fi. fa.* ceased. "These two writs are, in fact, but one writ—the one designed to complete what the other had commenced."

HARVARD LAW SCHOOL LIBRARY.

We therefore conclude that the *vendi.*, in this instance, was properly issued and executed after the death of *Scott*. We cannot see any distinction, nor any good reason why we should seek to distinguish between the case at bar and those cited. In some of the states a different rule prevails, perhaps growing out of statutory provisions.

Per Curiam.—The judgment is affirmed with costs.

D. Macy and *T. A. Hendricks*, for the plaintiff.

J. Morrison and *S. Major*, for the defendants.

May Term, 1853.

HARRIS v. STANTON.

4 120
141 572

HARRIS
v.
STANTON.

S., by *V.*, his attorney, during the term of the Circuit Court, filed a declaration in assumpsit, setting forth as the foundation of the action, two promissory notes executed by *H.*, one of which was not then due, and would not be for six months thereafter. *V.* also filed a warrant of *H.* to confess judgment on the notes. The warrant was directed to *V.*, authorizing him, in the usual form, to confess judgment, &c. The record showed that the execution of the warrant was duly proved to the satisfaction of the Court; the declaration and warrant appeared therein at full length; and immediately thereafter, without any intervening matter, the record proceeded thus: "And the said defendant now here waives the issue and service of process herein, and says that he cannot gainsay the plaintiff's action, nor but that he hath sustained damages by reason of the non-performance in said declaration mentioned, in the sum of," &c., being the amount of both notes. Judgment accordingly for that sum. The declaration alleged a promise to pay, in the usual form, *according to the tenor and effect of the notes*. *Held*, that the judgment was not entered by virtue of the warrant of attorney. *Held*, also, that if the confession were supposed to be a personal one, a judgment for the amount of both notes, would, under the declaration, have been unauthorized. *Held*, also, that the structure of the record precluded the idea that *V.*, or any other attorney, appeared for *H.* *Held*, also, that the terms used, "the defendant now here waives," &c., taken in connection with the context and the circumstances, do not authorize the conclusion that *H.* appeared in open Court and confessed the judgment.

Friday, May 27.

ERROR to the *Hamilton* Circuit Court.

STUART, J.—*Stanton*, by *Voss*, his attorney, during term, filed a declaration in assumpsit, setting forth as the foundation of the action, two promissory notes, one of which was not then due. The same attorney also filed a warrant to confess judgment on the notes. The warrant was directed to *Voss* himself, authorizing him, in the usual form, to confess judgment, &c. The record shows that the execution of the warrant was duly proved to the satisfaction of the Court. The declaration and warrant appear at full length; and immediately after, without any intervening matter whatever, the record proceeds: "And the said defendant now here waives the issue and service of process herein, and says that he cannot gainsay the said plaintiff's action, nor but that he hath sustained damages by reason of the non-performance in said decla-

ration mentioned, in the sum of 663 dollars and 30 cents. The judgment of the Court is accordingly for that sum.

It is not worth while to inquire to what class of judgments, whether *nil dicit*, *non sum informatus*, &c., the proceeding before us belongs. It is either a confessed judgment of some kind, or it is nothing.

The *English* courts have always exercised a very stringent supervision over warrants to confess, cognovits, &c. 1 Sellon Pr. 375.—2 Toml. Law Dic. 293.—Chitty Gen. Pr., title, "warrant to confess." There is a recent decision (*June*, 1852,) in the Q. B., showing that the vigilance of the courts to guard against frauds of that kind is not relaxed. *Pocock* v. *Pickering*, 11 Eng. L. & E. R. 461. The fact that many of the *English* decisions arise on statutes and rules of Court, subsequent to *James* 1, though it lessens their authority, does not depreciate their moral force, nor impair their sound public policy.

Without discouraging warrants to confess, this Court has also, on several occasions, shown its anxiety to guard the practice against abuse. 8 Blackf. 133.—1 Ind. 87.—*id.* 89. *Coonley* v. *Tracy*, at the present term.

It is not necessary to decide whether in this state a warrant to confess, directed to the attorney of the opposite party, is or is not regular. That question does not arise in the record. For the judgment was not entered, nor do counsel claim it to have been entered, by virtue of the warrant to confess which appears in the proceedings. *Voss*, the attorney for the plaintiff below, very properly abstained from acting on the warrant, and escaped from the embarrassing attitude in which he would have been placed, had he appeared as the attorney for both parties. But had the question of the validity of a power so directed, been raised, we should, on considerations of public policy, have felt great reluctance to sanction a practice so full of pernicious tendencies.

There is a serious discrepancy in the record, between the judgment and the supposed basis on which the Court acted. One of the notes set out in the declaration had six months to run at the time of judgment rendered. The

May Term, 1853.

HARRIS v. STANTON.

supposed confession set out in the record, does not cover this note. The declaration alleges a promise to pay in the usual form, according to the tenor and effect of the notes. The confession (if the personal presence of the defendant be conceded), runs, that he cannot gainsay the plaintiff's action, nor but that he hath sustained damages by reason of the non-performance in the declaration mentioned, &c. There could be no damages for the non-performance of the contract which had not yet matured. From the face of the declaration, the only non-performance that had occurred, was the non-payment of the first note. The amount of the first note, therefore, was, under the supposed personal confession, all the judgment to which the plaintiff below was entitled. The power of attorney, under seal, could not cure this defect; for we have seen that the power was not acted upon—the judgment was not entered in pursuance of the power. Hence a judgment for the full amount of both notes, is wholly unauthorized.

The question still remains, if *Voss* did not appear under the power, how was *Harris* brought into Court? In short, was he in Court in any manner known to the law? It is not pretended that process had been served upon him. Nor is it to be presumed that any other attorney had entered an appearance, or acted under the power to confess; for that power is directed to *Voss* alone. Indeed, the very structure of the record precludes the idea that *Voss*, or any other attorney, appeared for *Harris*. The only way, then, in which *Harris* could have been in Court was by personal appearance.

Finally, it all resolves itself into the single inquiry, did *Harris* appear personally in open Court and confess the judgment? This is a question of interpretation, which must be determined from a careful inspection of the whole record.

The usual formula of entering an appearance has not, in this instance, been observed. There are no such apt and safe words as "personally appeared, in open Court, *James Harris*, and waives," &c. Nor are there any words

equivalent to them. The terms used, "the defendant now here waives," &c., taken in connection with the context and the circumstances, cannot be regarded as sufficient, for there is nothing in the other parts of the record to support such a presumption—nothing to raise even a remote probability of such personal appearance. On the contrary, every *other* part of the record goes far to demonstrate that he did not appear. The novelty that a judgment should be confessed on a note which had six months to run, seems, in itself, inexplicable. Accordingly, we find that in this the record contains internal evidence of mistake. Again, if *Harris* appeared in open Court, there is no reason why the power of attorney should be produced and filed; no reason why its execution should be proved to the satisfaction of the Court, in the face of the very man who made it. It was equally unnecessary and singular to make both the power and the proof of its execution a part of the record, if, in fact, *Harris* was present in Court ready to confess judgment. Especially is all this useless and incredible, if *Harris* in person did confess.

It is readily admitted that the question is embarrassing. Yet, from a careful consideration of the whole record, and all the circumstances connected with it, we are constrained to come to the conclusion that *Harris* did not appear. There being no process, no appearance by attorney, and no personal appearance, there could be no recovery.

We regard it as a settled and salutary rule, sustained by judicial decision and public policy, that in all cases of recovery at common law, the defendant must be in Court in one or the other of these modes; and this fact the record should show affirmatively and clearly.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Robinson, for the plaintiff.

O. H. Smith and *S. Yandes*, for the defendant.

May Term, 1853.

MAGGART v. CHESTER.

MAGGART v. CHESTER.

1 4 138
138 106

A., by agreement in writing, leased to *B.* a field to be tilled in corn, containing about thirty acres, for one year from *March* 1, 1849; and *B.*, for the use of the field, was to give as rent one-third of the crop husked and delivered in the crib which *A.* was to furnish in the field. The corn was to be husked and cribbed on or before the 1st of *January*, 1850. The agreement then proceeds: The said *B.* is to move into the dwelling-house where *C.* now lives, and to have the privilege of firewood by using dead timber unfit for rails. *Held*, that the agreement rendered it obligatory upon *A.* to furnish *B.* a house to live in during the term of his lease. *Held*, also, that in an action by *B.* before a justice of the peace for the neglect and refusal of *A.* to furnish the house, an averment in the cause of action of a demand by *B.* of the house was not necessary, even if the demand were necessary to be proved in order to maintain the suit. *Held*, also, that it was competent for *B.* to prove, by parol, that the house was situate on the premises leased.

Friday, May 27.

ERROR to the *Tippecanoe* Court of Common Pleas.

DAVISON, J.—*Maggart* sued *Chester* before a justice of the peace. The defendant moved to dismiss the suit for want of a sufficient cause of action. Motion overruled and judgment for the plaintiff. The defendant appealed.

In the Court of Common Pleas, the defendant renewed his motion to dismiss, which was sustained, and judgment given for the defendant.

The cause of action alleges that *Chester*, who is described as guardian of the heirs of *Henry L. Doubleday*, deceased, entered into an agreement in writing with *Maggart*, whereby he leased to him a certain piece of ground belonging to said heirs, for the purpose of tilling the same in corn for one year from the 1st of *March*, 1849, together with a certain dwelling-house belonging to said heirs, where *J. Cullum* then lived, and also with the privilege of obtaining fire-wood. And in consideration of the lease and privileges aforesaid, *Maggart* bound himself, in said agreement, to deliver as rent one-third of the corn in the crib, on the 1st of *January*, 1850. It is averred that the plaintiff performed the agreement on his part; and the breach assigned is, that the defendant had neglected and refused to furnish to the plaintiff the said dwelling-house, &c.

The agreement referred to, was filed as a part of the cause of action. It shows that *Chester* leased to *Maggart* a field to be tilled in corn, situated on the north end of the *Doubleday* farm, containing about thirty acres, for one year from the 1st of *March*, 1849; and that *Maggart*, for the use of said field, was to give as rent one-third of the corn-crop, husked and delivered in the crib, which *Chester* was to furnish in said field. The rent-corn was to be husked and cribbed on or before the 1st of *January*, 1850. The agreement then proceeds: "The said *Maggart* is to move into the dwelling-house where *J. Cullum* now lives, and to have the privilege of fire-wood by using dead timber unfit for rails."

The dismissal of the suit is the only error assigned.

The clause in the lease upon which the questions in this case arise, is as follows: "The said *Maggart* is to move into the dwelling-house where *J. Cullum* lives."

It is contended that the language here used did not render it obligatory on *Chester* to furnish *Maggart* with a house; that if it amounted to any thing, it was a mere consent or stipulation on his part to move into the house.

We are not of that opinion. In giving an interpretation to the clause in question, we must look into the whole agreement, and give it such construction as will accord with the real intention of the parties; and this being done, it appears to us that their intention was, that *Chester* should furnish *Maggart* not only with land to till, but also with a house to live in during the term of his lease. Unless the clause referred to can be so interpreted, the reasons for placing it in the lease cannot be well understood.

A question is raised as to whether the plaintiff would have the right to show by parol that the house was situate on the land and constituted a part of the demised premises. We think he would. Parol evidence in that case would, in effect, merely identify the property, and not vary, contradict, or enlarge the agreement. 1 Greenl. Ev. ss. 286, 301.

It is insisted that the cause of action is defective, there

May Term, 1853.

BARGIS v. THE STATE.

being no allegation of a demand on *Chester*. We think the cause of action sufficient without such averment. This suit was commenced before a justice; and it has been held, that "any statement, however short or informal it may be, will answer the purpose, provided enough be shown to bar another action for the same demand, and apprise the defendant of the nature of the claim." 4 Blackf. 13.—5 *id.* 40.

If, in this case, a demand on *Chester* before suit was requisite, it could have been proved on the trial without an averment to that effect in the cause of action. 1 Ind. R. 224. The motion to dismiss should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. W. Chase, for the plaintiff.

R. C. Gregory, for the defendant.

BARGIS *v.* THE STATE.

When a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute.

An act of 1849 conferred upon justices of the peace in certain counties, exclusive jurisdiction over certain offences, and enacted that they should, "on complaint under oath, or on view, take jurisdiction of all such offences." *Held*, that the justice could not render a judgment against an offender upon confession of any such offence, except on such complaint or on view.

Friday, May 27.

ERROR to the *Wayne* Court of Common Pleas.

DAVISON, J.—*Bargis*, on the 5th of *January*, 1853, on the complaint of one *William McDonald*, was prosecuted before the mayor of the city of *Richmond*, in said county, for winning of *McDonald* 55 dollars on the result of the vote of the state of *Pennsylvania* for president of the *United States*.

Plea, not guilty. The justice gave judgment against *Bargis* for a fine and costs. *Bargis* appealed.

In the Court of Common Pleas the cause was submitted to the Court by consent, upon a written statement of facts. The Court found *Bargis* guilty, and assessed against him a fine. Motion for a new trial overruled, and judgment on the finding of the Court.

The following are the facts: On the 10th of *November*, 1852, *Bargis*, for the same betting mentioned in the complaint, voluntarily appeared before *James M. Poe*, a justice of the peace for said county, at his office in *Richmond*, where the offence was committed, and made a full confession of all the facts of said betting and winning, whereupon the justice, upon such voluntary confession, and without other evidence, assessed a fine of 2 dollars and costs against him, and ordered that he stand committed until the fine and costs be paid or replevied; that said fine was assessed without complaint or information, without any view of the offence by the justice, without any warrant having been issued, and without any witnesses having been sworn.

The question presented is, had the justice jurisdiction of the cause?

The 1st section of a statute of 1849, enacts that justices of the peace in several counties named in the act, shall have exclusive original jurisdiction in certain offences therein enumerated, and among them, the offence of gaming.

The second section of that statute is as follows: "And the said justices of the peace in said counties shall, on complaint under oath, or on view, take jurisdiction of all such offences." Laws of 1849, p. 78.

By an act of 1850, the provisions of the statute of 1849 are extended to *Wayne* county.

The 2d section of the act referred to, prescribes the mode in which the justice shall take jurisdiction, viz., "On complaint under oath, or on view."

The record shows that before the justice there was no complaint on oath, nor was the offence committed on

May Term, 1853.

DAWLEY v. THE STATE.

view; and it is a settled principle, that when a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute. *Bigelow* v. *Stearns*, 19 Johns. R. 39.

The plaintiff contends that the provision which requires a complaint under oath, was made for the benefit and protection of the defendant, and he may waive it. We are not of that opinion. The complaint is the first step in the proceedings; and is the mode in which the person of the defendant is brought within the jurisdiction of the justice.

It appears to us that the legislature did not intend that the justice should exercise the power given him, in a manner agreed on by him and the offender, and not in accordance with the statute. And it is not certain that a construction of the statute, permitting the justice to assume jurisdiction without "complaint under oath," would lead to a wholesome administration of the law. *Gold* v. *Bissel*, 1 Wend. 210.—*Low* v. *Rice*, 8 Johns. 409.—*Clayton* v. *Per Dun*, 13 *id.* 218.—8 Blackf. 396.

In our opinion, the conviction before the justice, constituted no defence to the prosecution in the Court of Common Pleas.

Per Curiam.—The judgment is affirmed, with costs.

J. Perry, for the plaintiff.

W. A. Bickle, for the state.

DAWLEY *v.* THE STATE.

The verdict of a jury against a person indicted for burglary, does not render him infamous, and, therefore, incompetent as a witness; but it is the judgment of the Court which does so.

A jury may convict a person of burglary upon the testimony solely of an accomplice.

The fact that the prosecuting attorney has refused to enter a *nolle prosequi* against a person indicted for burglary who has given testimony which led to the conviction of an accomplice under a promise of favor upon the disclosure of the whole truth, cannot affect the judgment against such convicted accomplice.

May Term, 1853.

DAWLEY v. THE STATE.

ERROR to the *Vanderburgh* Circuit Court.

Friday, May 21.

PERKINS, J.—*Dawley* was indicted, jointly with three others, in the *Vanderburgh* Circuit Court, for larceny in the stealing of a cow. He was tried separately, convicted, and sentenced to the penitentiary.

On the trial, one *Peltz*, who had, at the same term of the Court, been convicted of burglary but not sentenced, and who was charged as an accomplice in the case with *Dawley*, was made a witness on the part of the state, and testified against *Dawley* under an assurance that if he disclosed the whole truth he might hope for favor in his own case.

It is objected that *Peltz*, having been convicted of burglary, was not a competent witness. But judgment and sentence had not passed against him; and it is the judgment of the Court, and not the verdict of the jury, that renders the accused legally infamous, and, hence, incompetent as a witness. It is also urged that his testimony, being that of an accomplice, was not sufficient, uncorroborated, to authorize the jury to find a verdict of guilty. A jury may convict upon the testimony alone of an accomplice. *Johnson* v. *The State*, 2 Ind. R. 652. We regard *Peltz's* testimony, however, as strongly corroborated in this case.

It is further said that the prosecuting attorney refused to enter a *nolle prosequi* to the indictment against *Peltz* after he had testified. If such be the fact, it has nothing to do with *Dawley's* case, and can only be made the ground of an application to the executive for a pardon in that of *Peltz*. See the *United States* v. *Lee*, 4 McLean 103.

Per Curiam.—The judgment is affirmed with costs.

J. G. Jones, for the plaintiff.

A. L. Robinson, for the state.

May Term, 1853.

SCHOOLEY v. STOOPS.

SCHOOLEY and Another *v.* STOOPS and Others.

A. sold to *B.*, by deed of warranty, a tract of land incumbered by a mortgage executed by *A.*, and gave to *B.* a penal bond to secure the payment of the mortgage by a given day. *A.* failed to pay it; but *B.* had not paid it nor suffered any inconvenience from the non-payment. *Held*, in a suit by *B.* against *A.* upon the bond, that the damages recovered should have been only nominal.

Friday, May 27.

ERROR to the *Wabash* Circuit Court.

PERKINS, J.—Debt by the defendants in error against the plaintiffs in error, upon a bond of which the following is a copy. The date is the 15th of *March*, 1850. "Know all men by these presents, that *Isaac Schooley* and *Amer Allen*, of, &c., are held and firmly bound unto *James Stoops*, *John M. Myers*, and *Andrew M. Earley*, of, &c., in the penal sum of 600 dollars, for the payment of which they bind themselves, &c. The condition of the above obligation is as follows: that the above-named *Schooley* has this day sold unto the said *Stoops*, *Myers*, and *Earley*, a tract or parcel of land lying in *Grant* county, *Indiana*, and described as follows: a part, &c., containing eighty acres, for the sum of 1,200 dollars, the receipt of which is hereby acknowledged, for which the said *Schooley* made unto the said *Stoops*, *Myers*, and *Earley*, a warranty deed, conveying to them the title in fee-simple of said premises, while at the same time an incumbrance remained by mortgage, of 200 dollars, in favor of *Russ* and *Beauchamp*, dated *June* 1st, 1841, at 10 per cent. interest; now, if the said *Schooley* satisfies the said mortgage or incumbrance within seventy-five days from the making of this obligation, then," &c.

Breach, that he did not satisfy said incumbrance.

The defendants made default; a jury of inquiry was sworn to assess the damages; the only evidence offered for their consideration was the bond above set out; and they were instructed by the Court that upon it, the measure of damages was the amount of the mortgage specified in the bond, with 10 per cent. interest from the 1st of

June, 1841, which amount was accordingly assessed by the jury, and judgment was rendered upon the assessment. The defendants excepted.

The payment by *Schooley* of the damages recovered below in this case, will not discharge him from liability to pay to *Russ* and *Beauchamp* the amount due on the mortgage upon the land sold to *Stoops*, *Myers*, and *Earley*. He may be sued for that claim at any time, and he, or his legal representative, must be sued for it whenever it shall be collected by suit.

Had the debt to *Russ* and *Beauchamp*, which *Schooley* and *Allen* bound themselves in the bond sued on to pay, been originally due from *Stoops*, *Myers*, and *Earley*, then, on the failure of said obligors to pay said debt, the direct liability of those three men would have remained to pay it, and on their recovery of the sum in a suit against said obligors, the said obligors would be discharged, and would not remain liable to pay the sum a second time. In such a case there would be no hardship, at least, in the recovery of the full amount in a suit on the bond before the party suing had actually paid the money.

But in the case before us, a party gives bond to pay a debt of his own, which is a lien on land sold by him, by a given day, and fails to do it. Nevertheless, he still remains liable to pay the debt, to be sued for it, and one or the other, or both of these things may happen. The purchasers of the land bound by the lien have not paid it off, and may never do it; and have not, so far as appears, suffered any inconvenience. Why, then, should they recover for damages they have not sustained, and may never sustain? Suppose *Schooley* and *Allen* had paid off the incumbrance in question to *Russ* and *Beauchamp* on the day after the forfeiture of the bond, and had then been sued by *Stoops*, *Myers* and *Earley*, would these men, in such case, have been entitled to recover the full amount, or could the defendants have shown that no damage had been sustained, and thus reduced the amount recovered to nominal damages? They may still pay off said incumbrance, and why should the obligees in the bond re-

May Term, 1853.

BARNES v. DOE.

cover more than nominal damages till they have sustained more? They might, before suing, have gone forward and paid off the incumbrance, and then rightfully recovered the full amount. But they did not do so. They refused to pay it themselves, and they had a right so to refuse, and wait to see what the original debtor should do in the premises, holding the bond in question, with the additional security they had required on taking it, in reserve, to cover any damage they might sustain. We think the Court erred in their instruction to the jury.

We are aware that there are cases, and particularly *Lethbridge* v. *Mytton*, 2 Barnw. and Adolph. 772, that seem to be against the view we have taken, but we think the rule they support an unreasonable one. See Sedgwick on Damages, 2 ed., pp. 182, 183.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Brownlee, for the plaintiffs.

D. D. Pratt and *D. M. Cox*, for the defendants.

BARNES *v.* DOE on the demise of PELTON.

A tract of land was listed twice for taxes of the year 1827—once as first-class and once as second-class land. The clerk, in transcribing from the assessment-roll, carried out the tract as first-class land. The law of 1825, and the act of which it is amendatory, made it the duty of the clerk to carry out the assessment into the duplicate; but there was no provision in a case where the land was thus listed twice, which listing should be carried out. The land was afterwards sold for the non-payment of the taxes of 1827. *Held*, that the sale could not be supported.

The law in relation to the sale of land for the non-payment of taxes is construed strictly.

May Term, 1853.

BARNES v. DOE.

Saturday, May 28.

ERROR to the *Vigo* Circuit Court.

STUART, J.—Ejectment by the heirs of *Reemer*, deceased, for a tract of land claimed adversely under a tax-title. The cause was submitted to the Court for trial. Finding and judgment for the lessors of the plaintiff.

It is admitted that in *January*, 1827, *Aaron Reemer*, the ancestor, held the legal title, and that at the commencement of this suit the lessors of the plaintiff held the legal title, unless the title of the defendant below, *Barnes*, be superior.

The origin of *Barnes's* claim is by tax-title under the law of 1825, for taxes assessed in 1827. It appears that the land in controversy was listed twice for that year, once as land of the first class, and again as land of the second class. The clerk, *Curtis Gilbert*, in transcribing from the assessment-roll to the duplicate, carried out the tract in question as first-class land. *Gilbert* himself became the purchaser at the tax-sale, through whom remotely the defendant, *Barnes*, derives title. The law of 1825, and that to which it was amendatory, made it the duty of the clerk to carry out the assessment into the duplicate, &c. But there is no provision authorizing him to select, in a case like the present, where the land was listed twice, which should be carried out.

This raises the only question in the case. In *Williams* v. *The State*, this Court, speaking of the rule of construction applicable to such cases, says, that a strict construction of the law is fully authorized by the nature and consequences of the proceedings. 6 Blackf. 36. Adhering to that rule, the act of the clerk was without authority; and the tax-sale flowing from it cannot be supported.

Per Curiam.—The judgment is affirmed with costs.

S. B. Gookins, for the plaintiff.

W. D. Griswold and *J. P. Usher*, for the defendant.

May Term, 1853.

STANLEY v. BEATTY.

STANLEY *v.* BEATTY and Others.

The assignment of one of several notes secured by a mortgage is an equitable assignment, *pro tanto*, of the mortgage.

The person holding the note which first becomes due, is entitled first to be satisfied out of the proceeds of the mortgage.

The holder of one of several notes secured by mortgage is not obliged first to sue at law upon the notes, but he may, in the first instance, proceed in chancery for foreclosure.

Saturday, May 28.

APPEAL from the *Miami* Circuit Court.

STUART, J.—This was a bill in chancery to foreclose a mortgage. From the agreed state of facts, and such allegations in the bill as are otherwise established, we extract the following:

The defendant, *Wallick*, had purchased from *Hamilton* and *Godfroy*, respectively, two lots in *Peru*, and taken their title-bonds. These lots *Wallick* sold to the defendant, *Jones*, and instead of assigning the title-bonds of *Hamilton* and *Godfroy*, he gave his own separate obligation to *Jones* for a deed. *Jones* and the defendant *Kite*, had executed to the defendant *Beatty*, their two joint notes of 604 dollars each; the one due *February* 23, 1848, the other *May* 23, 1848. To secure the payment of these notes, *Jones* executed to *Beatty* a mortgage on the lots. *Beatty* afterwards assigned the note due *February* 23, 1848, to *Stanley*. *Stanley* put the note in suit, but on the guarantee of *Peeples* and *Skillman*, (who are not parties to the record), that the note would be paid by the 1st day of *May*, 1848, the suit was dismissed. At that time *Jones* was supposed to be solvent; but in two months after he fled the country, wholly insolvent. *Kite* paid *Stanley* in property 100 dollars, to be credited on the note; and to save *Peeples* harmless on the guarantee, he gave *P.* a mortgage on eighty acres of land in *Marshall* county. *Peeples* assigned this mortgage to *Stanley*, and at the same time took *Stanley's* obligation not to sell the land or permit it to be sold for less than 300 dollars.

Stanley renewed his suit at law on the note and re-

covered judgment against *Kite*—*Jones* not found. Having had a return of *nulla bona* in *Miami* county, *Stanley* directed execution to *Marshall* county, sold *Kite's* equity of redemption in the eighty acres mortgaged to *Peeples*, and *Stanley*, himself the assignee of that mortgage, became the purchaser at sheriff's sale, for 25 dollars. He then filed this bill to obtain satisfaction of the balance of the note out of the *Jones* lots.

Wallick had meanwhile assigned the title-bonds of *Hamilton* and *Godfroy* to *Beatty*.

The lots were worth from 700 to 800 dollars. There was a small balance of the purchase-money due from *Jones* to *Wallick*, and from *Wallick* to *Hamilton* and *Godfroy*, in whom the legal title was still vested. The bill prays that the lots be sold, and the liens paid in the order of their priority, &c. *Hamilton*, *Godfroy*, *Beatty*, *Wallick*, and *Jones*, are made defendants. On final hearing, the Court dismissed the bill. *Stanley* appeals.

The assignment of the note by *Beatty* to *Stanley* was an equitable transfer of the mortgage given to secure the note. 1 Blackf. 137.—4 *id.* 379.—7 *id.* 297.

But the mortgage was given to secure both notes—the one assigned to *Stanley*, the other still held by *Beatty*. What then are the equities of *Stanley* and *Beatty*, respectively, in this common security? *Stanley's* note was due *February* 23, 1848; *Beatty's May* 23, 1848. The note first due is to be first satisfied out of the proceeds of the mortgage. *State Bank* v. *Tweedy*, 8 Blackf. 447. This settles the prior equity in favor of *Stanley*, if no other disturbing causes intervene.

It is objected that *Stanley* might have collected the note had he not dismissed his first suit at law. But *Stanley* was not compelled to proceed at law. He might, in the first instance, have proceeded in chancery to foreclose, and swept the whole mortgaged property. Instead of that, he pursued the course which would give him, as the law then stood, the benefit of both remedies in proper succession. Under the proceeding at law he made part of the money, and had a return of *nulla bona*. When

May Term, 1853.

STANLEY v. BEATTY.

Stanley seeks his further remedy in chancery against the mortgaged lots, *Beatty* has no right to complain further than to see that all which *Stanley* actually realized by his legal proceedings, has been applied to the note; for the suit at law which secured part payment of the *Stanley* note, has resulted to the benefit of *Beatty*, who, standing in the situation of a junior mortgagee, acquired additional security by *Stanley's* success. The amount of *Beatty's* interest in the common security was thereby increased.

In one contingency alone would the laches of *Stanley* be available to *Beatty*. If *Stanley* should seek recourse on him as the assignor of the note, *Stanley's* diligence at law might then be properly put in issue.

What disposition should be made of the mortgage on the *Marshall* county land, it is not proper to decide. All the parties in interest are not before the Court. *Peeples* is interested in the disposition to be made of that security. So is *Kite*. And there may also be equities between *Kite*, *Peeples*, and *Skillman*, to be adjusted. None of them are parties to the bill. Whether the fact that *Stanley* was the assignee of the *Kite* mortgage at the time he purchased the equity of redemption at sheriff's sale, brings him within the rule in *Murphy* v. *Elliot*, 6 Blackf. 482, is not before us, and we intimate no opinion. But even if he is, there would still be a balance due on the note for which he would be entitled to payment out of the *Jones* lots. In such case, and especially if new parties were necessary, the bill should not be dismissed, but should stand over for amendment. 6 Blackf. 223. We think the Court erred in dismissing the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

A. A. Cole, for the appellant.

D. D. Pratt, for the appellees.

COONLEY *v.* TRACY and Another.

A judgment against a defendant upon a warrant of attorney will be held to be erroneous, unless the record shows that he appeared to the action in person or by attorney, or process was served upon him, or he was notified in some mode prescribed by law.

The provisions of s. 339, c. 40, R. S. 1843, are applicable only where there is an action pending against the defendant, and he appears at the time when he offers and consents in writing that judgment may be entered against him.

ERROR to the *St. Joseph* Circuit Court.

Saturday, May 28.

DAVISON, J.—*Tracy* and *Allen*, at the *March* term, 1847, filed their declaration in the *St. Joseph* Circuit Court against the plaintiff in error, upon a promissory note for the payment of 505 dollars and 37 cents. To the declaration was attached the following instrument in writing:

"I confess that I owe to the above-mentioned plaintiffs the sum of 505 dollars and 37 cents, being the debt by them in their declaration in this behalf demanded, and that said plaintiffs have sustained damage to the amount of 157 dollars and 10 cents, by reason of the detention thereof, besides their costs and charges in this behalf to be taxed by the clerk. And in case I shall make default in the payment of said debt, damages, and costs, on the first day of the next term of the said *St. Joseph* Circuit Court, to be holden in the court house at *South Bend*, commencing on the 29th day of *March*, 1847, the said plaintiffs shall be at liberty on the first, or any subsequent day of said term, to enter up judgment in said Court against me for said sum of 505 dollars and 37 cents, in debt, and said sum of 157 dollars and 10 cents, in damages, together with the costs as aforesaid, and also the costs of entering up such judgment and suing out execution thereon. Witness my hand and seal this 29th day of *January*, 1847. *Benj. Coonley*, [seal]. Attest, *E. B. Crocker*."

The execution of the above instrument was, upon the filing of the declaration, duly proved by the attesting wit-

May Term, 1853.

COONLEY v. TRACY.

ness thereto; and thereupon the Court gave judgment against the plaintiff in error for 662 dollars and 47 cents.

The record does not show that the defendant appeared, or that process had been served upon him.

In *Craig* v. *Glass*, 1 Ind. 89, it was held that "no legal judgment can be rendered on a cognovit, unless the defendant appear either in person or by attorney, or there has been service of process or notice in some mode prescribed by law."—*Ferrand* v. *McClease*, *id.* 87.

We are referred to s. 339, c. 40, R. S. 1843, which enacts that, "In any action founded on any judgment, decree, or express or implied contract, and in actions appealed from the decision of a justice of the peace, the defendant may offer and consent in writing, that judgment may be entered against him by confession for a specified sum; and such offer and consent in writing shall be entered on the record, and the time designated thereon when such offer was made," &c.

The defendants contend that the instrument appended to the declaration was an offer and consent in writing, &c., to confess judgment for a specified sum, within the meaning of the above section; and that an appearance was not requisite to give validity to a judgment rendered in the mode therein prescribed. We think they are mistaken. The section referred to evidently contemplates a pending action against the defendant, and his appearance therein, at the time he "may offer and consent in writing," &c.

This judgment cannot be sustained. It is liable to the same objection pointed out in *Craig* v. *Glass*, and *Ferrand* v. *McClease*, *supra*, and must, upon the authority of these cases, be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Liston, for the plaintiff.

E. B. Crocker, for the defendant.

May Term, 1853.

HOUSTON v. HOUSTON.

HOUSTON v. HOUSTON.

When the admission of evidence has been objected to at the trial, but the grounds of objection do not appear to have been stated, it will be presumed that the evidence was properly admitted.

When the declarations of a party have been admitted at the trial in her own behalf as a part of the *res gestæ*, and the record does not profess to set out all the evidence, but discloses enough to show that if certain other evidence had been offered, the declarations would have been admissible, it will be presumed that such evidence was offered.

Alimony may be decreed to be paid in instalments.

It may also be made payable in a shorter period than that which is allowed by law for the stay of execution.

There may be a stay of execution on a decree for alimony as in other cases for the payment of money.

ERROR to the *Switzerland* Circuit Court.

Saturday, May 28.

DAVISON, J.—This was a bill by the wife against her husband, for divorce and alimony. The cause alleged was cruel and inhuman treatment. He answered the bill, and also filed his cross bill, which she answered. Replications were filed to the several answers.

The cause was submitted on bill, cross bill, answers, and the testimony of witnesses.

Upon a final hearing, the Court dismissed the cross bill, granted a divorce, and rendered a decree in her favor and against him for alimony, 1000 dollars. The alimony was to be paid as follows: 250 dollars within thirty days from the date of the decree; 250 dollars within seven months; 250 dollars within thirteen months; and the residue, being 250 dollars, within nineteen months.

It appears from a bill of exceptions contained in the record, that upon the trial it was proved that at one time last winter, when the weather was cold and wet, the complainant came to the house of *Ann Patton*, in the town of *Vevay*, in the night-time. She appeared to be very cold, and was trembling. She had on her shoes but no stockings, and was partly in her night-clothes. The parties resided in *Vevay*.

That at another time during the same winter, *Ann*

May Term, 1853.

HOUSTON v. HOUSTON.

Patton was at the house of the defendant, and in one room of the house, while complainant and defendant were in an adjoining room. There were no other persons in the house. Witness, *Ann Patton*, heard two slaps or strokes, which, from the noise, appeared to have been caused with some flat substance. The defendant came out of the room and passed through the room where witness was. Complainant then came into the room where witness was. Her face looked red and sunken. It was not so when she left the witness a few minutes before. That at another time in *July* last, the complainant came to the house of one *Dickson*, very early in the morning, in the town of *Vevay*. Her face appeared to have been scalded. It was red, and a short time afterward, the place blistered. There were tea-grounds in her hair, and it was wet. There was also a slight cut or bruise behind her ear.

That the defendant, on the next day after the complainant went to the house of *Ann Patton* in the night, sent his brother to complainant to say to her that he, the defendant, wished her to come home, and she should be better treated.

Thereupon the complainant proposed to give in evidence what she stated in the absence of the defendant to other persons, at the several times above referred to; to the introduction of which declarations as evidence the defendant objected; but the Court overruled the objection, and received and considered the declarations of complainant to prove that on the first occasion the defendant forcibly drove her out of his house in the night; and on the second, that he struck her with the bottom of a carpet-sack; and on the third, threw a tea-pot of hot tea at and struck her, and scalded her.

The plaintiff in error contends that the Court erred by overruling his objection to the evidence. The ground of objection does not appear to have been presented to the Court. And in accordance with repeated decisions of this Court, we must consider the evidence properly admitted.

There is, however, another reason why the objection cannot be noticed. The record does not profess to set out all the evidence given in the cause. We will, therefore, in favor of the ruling of the Court, presume that the declarations were shown to have been so connected with the principal fact under consideration, as to make them a part of the *res gestæ*.

The Court that hears the case must, in the exercise of a sound discretion, determine upon the admissibility of such declarations when offered in proof, according to the degree of their relation to the principal transaction. 1 Greenl. Ev. s. 108. And not having before us all the evidence in the cause, we cannot say that, in this case, such discretion was improperly exercised.

It is further contended, that the Court had no power to direct the sum allowed as alimony to be paid by instalments, or that any part of said sum should be made payable in a shorter period than authorized for the stay of execution. We think this is a mistake. The allowance of alimony may be made for a gross sum, or payable by instalments. *Fischli* v. *Fischli*, 1 Blackf. 360, and n. 1. Nor is there any reason why the decree in this case should not, as other decrees for the payment of money, have been subject to a stay of execution.

Per Curiam.—The decree is affirmed, with 2 per cent. damages and costs.

J. G. Marshall and *D. Kelso*, for the plaintiff.

J. Dumont, for the defendant.

The State v. Alsop.

4 141
171 5

A count in an indictment founded on s. 100, c. 53, R. S. 1843, alleged that the defendant "did then and there suffer his house, building, room, arbor, booth, shed, and tenement, to be used and occupied for gaming." *Held*, that the count was not liable to objection for duplicity.

May Term, 1853.

THE STATE v. ALSOP.

It was alleged in the second count that the defendant, "at and in the county aforesaid, did then and there knowingly keep, and suffer his house," &c., "to be used," &c. The venue, *Posey* county, had been distinctly stated in the introduction to the indictment. *Held*, that it sufficiently appeared in both counts, that the house, &c., were situate in that county.

Saturday, May 28.

ERROR to the *Posey* Circuit Court.

ROACHE, J.—Indictment against *Alsop*, founded on s. 100, c. 53, R. S. 1843, containg two counts. Motion to quash both counts sustained by the Circuit Court.

It is objected to the first count that it charges several offences, and is bad for duplicity. This count, following the language of the statute, alleges that the defendant "did then and there suffer his house, building, room, arbor, booth, shed, *and* tenement, to be used and occupied for gaming." If the charge in the indictment had been in the disjunctive, it would, perhaps, have been bad for uncertainty; but according to the authorities, the form of the allegation in this indictment is sufficiently certain, and is not liable to the objection of duplicity. See *The State* v. *Staker*, decided at the last term (1). See, also, *Dormer* v. *The State*, 2 Ind. R. 308.—*The State* v. *Slocum*, 8 Blackf. 315, and note 1.—*Commonwealth* v. *Eaton*, 15 Pick. 273.

It is objected to both counts that the venue is not sufficiently laid. The charge in the first is set out above. In the second count it is alleged that the defendant, "at and in the county aforesaid, did then and there knowingly keep and suffer his house," &c., "to be used," &c.

The offence created by the statute, is the keeping and suffering a house to be used for gaming. The charge in both counts is, that he kept and suffered his house, &c., to be used for gaming, then and *there*, distinctly referring to the venue already laid, *Posey* county. It is insisted that it should have been formally stated that the house was situate in *Posey* county; but the offence created and defined by the statute is very sufficiently described by the allegation that the defendant *kept* the house to be used for gaming, in that county.

The motion to quash should have been overruled. See *The State* v. *Slocum*, and *The State* v. *Staker*, *supra*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. L. Robinson, for the state.

J. Pitcher, for the defendant.

(1) 3 Ind. R. 570.

Doe on the demise of Harlan and Others *v.* Brown.

To defeat the recovery of a plaintiff in ejectment who produces a regular title, by a title founded in possession, strict proof must be made not only that the possession was from its inception under a public claim of title adverse to that of the real owner, but that both such claim and possession have been continuous and uninterrupted for a period of twenty years before the commencement of the suit.

Where several tenants have, during such period, successively occupied the premises, to make their possession available against the real owner, it must be shown that each one claimed to hold and was in possession under his predecessor.

Saturday, May 28.

ERROR to the *Fayette* Circuit Court.

Roache, J.—Ejectment by the heirs of *Joshua Harlan*, for a lot in the town of *Connersville*. Verdict and judgment for the defendant. Motion for a new trial overruled. The evidence is all set out in a bill of exceptions.

The plaintiffs were admitted at the trial to be the heirs of *Joshua Harlan*. They then gave in evidence a deed of conveyance from *John Conner* to their ancestor, dated the 30th day of *November*, 1818. It was further admitted by the defendant that *Joshua Harlan*, in his lifetime, laid out a portion of the land embraced in the deed, into town lots, as a part of the town of *Connersville*, and that the lot No. 87, in controversy in the suit, was one of those lots.

May Term, 1853.

Doe v. Brown.

The defence set up by *Brown*, who was admitted defendant under the rule, was an adverse possession by himself and one *Solomon Claypool*, of twenty years. The evidence introduced by him showed that *Joshua Harlan* died about the year 1827; that sometime between 1826 and 1828, *Solomon Claypool*, claiming to be the owner of the lot, leased it for a term of years to be fenced and cleared; that it was accordingly fenced and cleared by the lessee, in one of those years, most probably in 1827; that at the expiration of that lease, he rented it to a tenant to make brick upon it. Shortly afterward, the fence was removed, it does not appear by whom, and the lot remained vacant and unenclosed up to 1843, a period of not less than ten years; but during all that period *Claypool* continuously claimed, and was generally understood, in the neighborhood, to be the owner; that from 1830 to 1845, both inclusive, the taxes on the lot were annually charged to and paid by *Claypool*, in which latter year he died. The tax duplicates, which were in evidence, showed that in 1827, the lot was not assessed to any one; that in 1828 and 1829, it was placed on the duplicate, but was included in the list under the heading of "unknown owners;" and that in neither of those years were the taxes upon it paid by either *Harlan* or *Claypool*.

The defendant also proved by one *Bundrant*, that he had known lot No. 87 since 1837; that it was then unenclosed, and was called the property of *Solomon Claypool;* that in 1843, the defendant, (*Brown*), went into possession of the lot, fenced it and built a house, and has occupied it ever since.

This was all the evidence.

The plaintiffs asked for several instructions to the jury, all of which the Court refused to give. It is unnecessary, however, to examine whether these instructions should have been given, as they were all substantially embraced in the charge which the Court gave. The jury were fully and correctly instructed as to the law of the case. It only remains to examine whether their verdict was sustained by the evidence.

In their instructions, the Court below charged the jury that a continuous, uninterrupted, peaceable possession of twenty years, under a claim of title, was necessary to make out the defence relied on by the defendant, and that if it was necessary to add the possession of *Brown* to that of *Claypool*, to make up the twenty years, he, the defendant, must show that he was in possession under *Claypool*. This is the law. To defeat the recovery of a plaintiff who produces a regular legal title, by a title founded in possession, strict proof must be made not only that the possession was, from its inception, under a public claim of title adverse to that of the real owner, but that both such claim and possession have been continuous and uninterrupted. And this continuity must be kept unbroken through the full period of twenty years. If the chain is broken at any point within that period, no title is acquired. In the case where several tenants have, during the time, successively occupied the premises, to make their possession available it must be shown that each one claimed to hold, and was in possession, under his predecessor. *Brandt* v. *Ogden*, 1 Johns. R. 156.—*Doe* v. *Campbell*, 10 *id.* 475.—*Hawk* v. *Senseman*, 6 Serg. and Rawle, 21.—*Coburn* v. *Hollis*, 3 Met. R. 125.

In the case under consideration, *Brown* could not make out the twenty years without connecting his possession with that of *Claypool*, by showing that he was in under him. If there was any evidence on this point, we should not be disposed to disturb the verdict of the jury. But if the bill of exceptions contains all the evidence, as it purports to do, there is no proof tending to connect the possession of *Brown* with that of *Claypool*. Neither one of them was in possession for a period of twenty years. *Claypool* was occupying and claiming title for some sixteen years, from about 1827 to 1843. Then, it is in proof, *Brown* went into possession; but how, or under what circumstances, is not shown. From aught that appears, he may have gone in as a mere trespasser, against the consent of *Claypool*. Having totally failed to establish that his possession of the premises was a continuation of that of

May Term, 1853.

BRICKER v. HUGHES.

Claypool, by showing that he was in under the latter, he has left a chasm in his title which is fatal to the defence he relies on.

The Court should have granted the motion of the plaintiffs for a new trial.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. A. Fay and *J. S. Newman*, for the plaintiff.

J. Rariden, for the defendant.

BRICKER *v.* HUGHES.

Growing crops raised annually by labor, are subject to sale as personal property, even before their maturity, and the sale does not necessarily involve an interest in realty requiring a written agreement.

A sale of personal property is not complete, where something yet remains to be done by the seller before the article sold can be identified.

In trover, upon the general issue, the plaintiff must recover upon the strength of his own title and right of possession, and not on the want of title of his adversary.

Saturday, May 28.

ERROR to the *Vermillion* Circuit Court.

PERKINS, J.—Trover by *Bricker* against *Hughes* for the conversion of a quantity of corn. Plea, the general issue. Trial by the Court without a jury, and judgment for the defendant.

The evidence is upon the record.

The original owner of the corn in question was one *Guffy*, who sold, or attempted to sell, it, at different times, both to the plaintiff and defendant.

In *November*, 1847, while the corn was still standing in the field, he sold it to the defendant, *Hughes*. "The corn," says the witness, "was to be delivered in the month of

May following. *Hughes* wanted *Guffy* to haul it to the river, but *Guffy* did not know whether he could, and it was finally agreed that if *Hughes* hauled it, the expense for hauling, whatever it might be, should be deducted out of the price, which was 16 and a half cents a bushel, upon the bank of the river, in the crib. *Hughes* bought *Guffy's* corn, eight hundred bushels, more or less." He paid something on it at the time of the purchase, and *Guffy* subsequently delivered about seventy bushels to *Hughes*.

Another witness states that *Bricker* called at the store of *Hughes* a short time after the latter "had bought *Guffy's* corn, and said he heard that *Hughes* had bought the corn of *Guffy;* that he, *Bricker*, had an account against *Guffy*, and wanted *Hughes* to save it for him; it was a doctor-bill, the amount not recollected. *Hughes* said *Guffy* owed him already nearly the amount of the value of the corn, but if he got the full quantity, eight hundred bushels, there would be something going to *Guffy*, and he would try and save *Bricker's* account out of it." Afterwards, *Hughes* went down the river on business.

While he was absent, on the 30th of *January*, 1848, *Sunday*, says a witness, (*Chambers*), "I met *Bricker* and *Guffy* in the *Wabash* bottom, on the bank of the river. They called on me to witness a contract for the sale of corn and some other property which, they said, had taken place the day before. They both said that *Guffy* had sold *Bricker* a quantity of corn then on the *Bales* farm, upon which it was cultivated by *Guffy*. The corn sold was all the corn *Guffy* had raised on the farm, except one hundred bushels sold to *Henry Martin*, and three hundred and twenty-six bushels, the rent-corn to the landlord. I had been employed previously by *Guffy* to gather this corn and put it in a crib on the farm. About five hundred bushels had been gathered at the time of the alleged sale. At that time it was stated by *Guffy* that I should go on and gather the corn, and deliver it in said crib for *Bricker*, which I did." *Bricker* paid for the corn in a bill for medical services, &c., and *Guffy* paid for gather-

May Term, 1853.

BRICKER v. HUGHES.

ing it. *Bricker* employed witness to haul the corn to a crib on the *Wabash* river. The crib in which the corn was placed on the bank of said river, belonged to the defendant, *Hughes*, whose clerk had given *Bricker* permission thus to occupy it without knowing what corn it was that was to be placed in it. About six hundred and fifty bushels in all were deposited in the crib. *Hughes*, on his return, finding the corn in his crib, took it on a boat "down the river," and sold it.

The counsel for the plaintiff contend, and it is the only position they rely upon to reverse the judgment below, that the Court erred in finding against *Bricker* on the evidence, because no property passed to *Hughes* on the sale of the corn by *Guffy* to him, as the quantity sold was not separated from that grown on the same farm with it, belonging to other persons. But this is begging the question. That the corn sold was mixed with that belonging to other persons is assumed, not proved. The evidence is, that *Hughes* bought *Guffy's* corn, more or less. This corn *Guffy* raised on a farm belonging to another person; but the character of the contract under which it was raised is not proved. And suppose the use of the farm was to be paid for by giving a part of the crop, still *Guffy* might have taken his portion in a separate part of the field or fields, and thus had it by itself. In other words, the corn might have been divided by making a division of the field or fields in which it was grown, before it was gathered. And if such a division had been made, the sale of his corn by *Guffy* to *Hughes* in this case passed the title; and as *Bricker* bought afterwards with full knowledge of said sale, he has no pretence on which to claim the corn.

Growing crops raised annually by labor, are the subject of sale as personal property, even before their maturity, and their sale does not necessarily involve an interest in the realty requiring a written agreement. *Northern* v. *The State*, 1 Ind. R. 113.

But if the corn had not been divided before it was gathered, then there is no evidence that it had been be-

fore the pretended sale to *Bricker*. The evidence in regard to that sale is, that it embraced all the corn *Guffy* had raised on the *Bales* farm, except one hundred bushels sold to *Henry Martin*, and three hundred and twenty-six bushels, the rent-corn to the landlord. And if the corn belonging to *Guffy* had not, at that time, been separated from that belonging to *Martin* and that belonging to the landlord, then no title passed to *Bricker*, because something yet remained to be done by the seller before the particular corn sold could be known; and we do not think the procuring the whole quantity belonging to *Martin*, the landlord, and *Guffy*, to be removed into a crib belonging to *Hughes*, in the manner it was done in this case, can help the matter. Conceding, therefore, for argument's sake, that *Hughes* had no title, still *Bricker* could not recover; for, in trover, upon the general issue, the plaintiff must recover, if at all, upon his own title and right to possession.

In this case, it is manifest the equity is all on the side of the defendant. The Court below, sitting as a jury, has found in his favor, and the judgment is certainly not so clearly wrong as to authorize this Court to disturb it.

Per Curiam.—The judgment is affirmed with costs.

A. Kinney and *J. P. Usher*, for the plaintiff.

J. A. Wright and *E. W. McGaughey*, for the defendant.

LANEY *v.* LANEY and Others.

As a general proposition, a party who has expressly or by his acts waived his title to property, will be estopped from asserting it against a party who has invested money on the faith of such waiver.

Where the allegations in a bill are general and indefinite, but sufficient to make it substantially good, and the decree is to be made on the bill without an answer, it is as much the duty of the chancellor to require proof

May Term, 1853.

LANEY v. LANEY.

reducing the matters alleged to certainty, as it is that of a court of law to award a writ of inquiry to assess the damages upon a general and indefinite declaration.

The evidence in such a case must show that there is ground for the decree, or none can be rendered.

Saturday, May 28.

ERROR to the *Parke* Circuit Court.

PERKINS, J.—Bill in chancery by the heirs of *Joseph Laney*, deceased, against *Abraham Laney*, praying for an injunction restraining him from asserting title to certain real estate.

Decree for the plaintiffs below on demurrer; which decree was reversed in this Court at the *May* term, 1850. *Laney* v. *Laney*, 2 Ind. R. 196. Subsequently a rehearing was granted, and the cause again submitted to the Court for decision.

The facts stated in the bill are, that on the 3d of *July*, 1833, *Joseph Laney*, the father of the plaintiffs in this bill, was the owner in fee of the east half, &c., containing eighty acres of land; that at the same time he was indebted to *M.* and *W. Robins* in the sum of 40 dollars, to pay which with he possessed nothing, except said piece of land; that to prevent said *Robinses* from selling the land under execution for the purpose of collecting said sum, said *Joseph Laney* conveyed the land by deed in fee to his father, *Abraham Laney*, who had full knowledge of the object of the conveyance, and advised the making of it; that afterwards said *Joseph Laney* paid off said 40 dollar debt to the *Robinses*, and thereupon requested a reconveyance of said land from his father, *Abraham*, who replied to said request, that he had destroyed said deed, and no reconveyance was necessary; whereas, he had not destroyed it, but on the contrary was retaining it in his possession; and afterwards, in 1842, the year in which said *Joseph Laney* died, but before his death and without his knowledge, the said *Abraham* took said deed to the recorder's office, and had the same duly recorded; that said *Abraham* never claimed possession of the land nor the rent of it, but that the same remained in the possession of said *Joseph* till his death in 1842; and that since,

until the filing of this bill, and to the time of trial, in 1848, it had remained in the possession of the plaintiffs, his heirs, the said *Joseph* and said heirs holding it as their own property, paying the taxes and making improvements to the value of 300 dollars, and all this with the knowledge of said *Abraham*. It further alleges that said *Abraham* now claims to be the owner, and to have a right to the possession of said land under said deed.

When this case was decided on the former submission, it was placed on the general and well-settled principle that a conveyance fraudulent as to creditors is good as against the grantor and his heirs; see *Laney* v. *Laney*, *supra;* and this was the main ground taken in the demurrer to the bill. But it is contended that that principle is not here applicable. It is urged that this case is to be decided by the principle of estoppel; that as *Abraham Laney*, when requested by *Joseph* to reconvey the land, denied claiming it, and declared that he had destroyed the deed, and thereby induced *Joseph* and his heirs to improve it as their own, he is now not to be permitted to assert the contrary.

It is settled, as a general proposition, that a party who has expressly or by his acts, waived his title to property, will be estopped from asserting it against a party who has invested money on the faith of such waiver. *Higginbotham* v. *Burnet*, 5 Johns. Ch. R. 184, and the cases generally in the digests under the head of estoppel by matters *in pais*.

This case may be one falling within the foregoing proposition. The allegations in the bill are very general, and would admit proof of facts making out a case of estoppel against *Abraham Laney*. At the same time it must be admitted, the bill itself, from its general character, leaves the matter in some uncertainty. We should like to have known more particularly the agency of the father in inducing the son to convey to him; the age and capacity of the son; the length of time that elapsed before he paid the *Robinses*, &c.; the character of the improvements he made upon the farm, and also of those

May Term, 1853.

LANEY v. LANEY.

made by the heirs, &c. These, and other facts, not particularly detailed in the bill, might appear upon a final hearing on the bill, answer, and depositions. The bill was not objected to below for uncertainty.

Another principle may have some bearing upon this case. It seems to have been an old doctrine of the maritime law, that if a sailor who had broken his contract, by leaving the service, whereby he forfeited his wages, subsequently, after a space for repentance, returned to his duty, he relieved himself from the effects of the forfeiture, and saved his wages. This was said to be upon grounds of policy. See *Coffin* v. *Jenkins*, 3 Story R. 108. And in Hill on Trustees, the author, in speaking of voluntary conveyances, says:

"Where, however, the purpose contemplated by the deed, though illegal, or such as the Court would not sanction, *is abandoned*, or *not acted upon by the parties*, it seems that the Court will not recognize that purpose as evidence of an intention that the donee should not take beneficially [as a trustee], and on that ground will establish the trust in favor of the grantor; or, at any rate, it will interpose so far as to grant an injunction against suing on the deed at law, until the hearing of the cause." See pp. 108, 109, 110. Whether the authorities will support the above position of Mr. *Hill*, we do not say, and we here decide nothing as to this point. Perhaps, while on the one hand, public policy should compel the man who conveys his property away to defraud his creditors, and adheres to the purpose, to forfeit that property, as against his grantee, on the other, the same policy should encourage a return to honesty by restoring his property to the man who relinquishes his fraudulent purpose and pays up his creditors. The voluntary grantee could have no ground to complain of such restoration. But these questions, as has been intimated, will more properly arise for decision in this case, if they shall arise in it at all, when the exact facts appear upon the record. Now, a decision of them would be upon a mere hypothetical case.

The decree of the Court below must be reversed, and

the cause must go back for another hearing there. That Court erred on the former hearing in proceeding to a final decree without proof. The allegations in the bill, as we have said, are very general and indefinite, but yet such as to make it substantially good; and where such is the fact, and the decree is to be made upon the bill, no answer being filed, it is as much the duty of the chancellor to require proof reducing the matters to certainty, as it is that of a court of law to award a writ of inquiry to assess damages upon a declaration, general and indefinite; and if the proofs furnished do not show that there is ground for a decree in favor of the plaintiff, he can have no final decree in his favor. *Close* v. *Hunt*, 8 Blackf. 254, was a bill to enforce a mechanic's lien for materials furnished. There was a decree below for the plaintiffs. The Supreme Court said: "The decree was rendered upon the statements in the bill without proof. The statement with regard to the times of furnishing the materials is very indefinite. The statement is, that the materials were furnished between the 1st day of *April* and the 1st day of *September*, 1840. This might be true, and still more than a year have elapsed between the delivery of the last lumber furnished and the 10th day of *July*, 1841, when the bill was filed. When the allegations of a bill are uncertain and indefinite, though taken as confessed, no decree should be rendered, unless the uncertainty be removed by evidence. *Pegg* v. *Davis*, 2 Blackf. 281." See, also, *Bowman* v. *Hall*, 2 Ind. R. 206.—*Trimble* v. *White*, *id.* 205.

Per Curiam.—The decree is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

A. L. Roache and *W. P. Bryant*, for the plaintiff.

J. A. Wright and *E. W. McGaughey*, for the defendants.

May Term, 1853.

BEATTY v. GATES.

BEATTY v. GATES.

The existence and terms of a judgment must be established by the production of the record.

It is the province of the Court, and not of the jury, to determine the construction to be given to a written agreement.

Monday, May 30.

ERROR to the *Kosciusko* Circuit Court.

ROACHE, J.—The defendant in error commenced a suit before a justice of the peace, by filing the following written agreement, with the proper averments, as his cause of action:

"Be it remembered, that on the 23d day of *November*, 1847, *Merrill Gates* and *Dempster Beatty* have hereby agreed to settle all the difficulties and accounts of whatsoever name, on the following terms, to-wit: the said *Gates* is to have the cattle and yoke and chains that have been in dispute between them, and pay the costs of a suit before *A. McCowen*, Esq., and said *Beatty* is to pay the costs of a suit between them before *William B. Wade*, Esq. Said *Beatty* also agrees to withdraw an appeal cause now in the Circuit Court between said parties; and this is intended by said parties to be a full and final receipt between them of all debts, dues, and demands whatsoever. *Merrill Gates*, *Dempster Beatty*."

The case was appealed to the Circuit Court, where there was a trial by jury, and a verdict and judgment for the plaintiff below.

By a bill of exceptions, it appears that on the trial the plaintiff offered to prove by the president judge, that at sometime previous to the date of the writing sued on, a suit had been pending in the *Kosciusko* Circuit Court between the parties to this suit, in which the Court had adjudged the oxen to belong to *Beatty*. The defendant objected, but the objection was overruled, and the testimony went to the jury.

It was, in effect, proving the contents of a record by parol. After laying the proper foundation, by the pro-

duction of the record, it might have been competent to introduce parol proof to identify the parties and the subject matter of controversy; but the existence and terms of a judgment must be established by the production of the record. 1 Greenl. Ev. 162, s. 86.

It was proved that both parties knew, when they entered into the agreement, that one of the oxen mentioned therein, had been dead for months, and that the other was not, and had not been for sometime, in the possession of either party, but had been running at large.

After the testimony was closed, the Court gave the following instructions to the jury, which were, at the proper time, objected to by the plaintiff in error.

1. "If at the time this compromise was made, one of the oxen was dead, and *Gates* knew it, he cannot recover for that ox from this defendant, if the jury are satisfied from the evidence that *Gates* agreed to take the oxen as they then were.

2. "If, from the evidence, the jury believe that the writing sued on was a sale by *Beatty* to *Gates*, and that *Beatty* received satisfaction therefor by compromise of a pending suit, or otherwise, then, if both oxen were dead before suit, before demand was made for them, the loss must fall on the purchaser, *Gates*. But if the jury believe, from all the evidence in the case, that the paper sued on contains the terms of a settlement in which the plaintiff sues to have either the oxen when delivered, or the value of them if not delivered, then, if the oxen were not delivered, the plaintiff is entitled to recover their value."

The language of these instructions is somewhat vague; but in any view that can be taken of them, it is very clear that they were both erroneous. The jury were, in effect, directed to give a construction to the written agreement sued on. This was the province of the Court. The jury should have been told they were to take the construction of the agreement from the Court, and that their province was to determine, from the evidence, whether the defendant below had been guilty of a breach of this written con-

May Term, 1853.

CLARK v. THE STATE.

tract, thus construed by the Court. *Harris* v. *Doe*, 4 Blackf. 369.—*The Richmond Tr. & Man. Co.* v. *Farquar*, 8 *id.* 89.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

---

4 156
165 625

CLARK *v.* THE STATE.

A witness may be permitted to refresh his memory by referring to a memorandum written by himself or another, at or near the time of the occurrence to which he testifies; but he can then only testify from his recollection.

The fact that the memorandum was made out while the facts were fresh in his memory, and that he then knew that the particulars contained in the memorandum were correctly stated, is not sufficient.

Monday, May 30.

ERROR to the *Henry* Circuit Court.

ROACHE, J.—Indictment charging the plaintiff in error with fixing a fraudulent value on his property liable to taxation, under s. 90, c. 53, R. S. 1843.

Upon a trial by a jury, he was found guilty. Motions for a new trial, and in arrest of judgment, overruled, and judgment on the verdict.

On the trial, one *Forkner* was offered as a witness on behalf of the state, to prove the number and value of the articles of personal property owned by *Clark* on the 1st day of *January*, 1846.

The witness testified that at the time mentioned, he lived near *Clark*, and was then well acquainted with his personal property; that on a former trial of this indictment, at the spring term, 1847, he was sworn as a witness and testified fully on the subject, and that then his recol-

lection was fresh and distinct as to the various articles of which his property consisted, and their value; that his testimony was, during said trial, reduced to writing by *Martin L. Bundy*, the attorney conducting the prosecution; that on the day after that trial, he procured *Bundy* to make out from the minutes thus taken of his testimony, an exact list of the several items of defendant's property, and their value, which list he then knew to be correct in all particulars, and was in exact accordance with the statements made by him at the trial on the previous day; that he knows the testimony then given by him was correct, and that the list was correctly made out from the evidence. The witness then proceeded to say "that, at this time he can only recollect the various kinds of property owned by said *Clark* on or about the 1st of *January*, 1846, but that he cannot recollect the quantity or number of each kind, or their value, and has no definite recollection on said points, and can only state them from said written memorandum, and has no recollection thereof at this time, as facts from the mind, but knows that the written memorandum is true from the circumstances above stated." Thereupon the Court permitted the memorandum to be read to the jury, as the evidence of the witness in the cause, in connection with his preceding statements.

A witness may be permitted to refresh his memory of facts, by referring to a written memorandum, written either by himself or by another, at or near the time of the occurrences; but the memorandum cannot be substituted in the stead of the recollection of the witness.

If an inspection of the writing recalls to the mind of the witness facts which he had previously known, but which had, at the moment, escaped his recollection, he can then testify to such facts as being within his own personal knowledge.

A different doctrine seems to have been held in some of the states; but the weight and current of decisions both in *England* and *America*, fully sustain these views. See the last *American* edition of 1 Phil. Ev. 289 and 458,

May Term, 1853.

HARBOR v. MORGAN.

and 1 Stark. Ev. 128, and authorities there cited; and *Doe* v. *Perkins*, 3 T. R. 749.—*Kensington* v. *Inglis*, 8 East R. 273.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Rariden, for the plaintiff.

D. S. Gooding, for the state.

---

4 156
124 198

HARBOR *v.* MORGAN.

A. executed to *B.* a note payable at a day specified, in money or wheat at the customary prices at *F.*, &c. *Held*, that a demand of the wheat was not necessary before suit. *Held*, also, that the wheat was to be delivered at *F.*

An accord, to be pleaded in bar, must have been executed.

When evidence is pertinent to the issue, it should be admitted, however little it may seemingly tend to prove.

Monday, May 30.

ERROR to the *Randolph* Circuit Court.

STUART, J.—Assumpsit on a note due *October* 1, 1849, payable in money or wheat, at the customary price at *Fairview*, in said county. Breach, that the defendant had failed to pay the money, or in anywise comply with the conditions of said note.

The defendant filed the general issue and two special pleas. Demurrers to the second and third pleas sustained, trial by the Court, and judgment for the plaintiff below. The second plea avers his readiness to pay in wheat on, &c., at his farm near *Fairview*, &c. The demurrer to this plea was correctly sustained. The time of payment was fixed by the contract, and no demand before suit was necessary. 1 Ind. R. 224. As wheat is not generally classed by the authorities among cumbrous articles, no inference

can be drawn that the parties intended *Harbor's* farm to be the place of delivery.

The third plea alleges an agreement made in *December*, 1849, between *Jernagan*, the holder of the note, and the defendant below, to the effect that if *Harbor* would procure for the defendant a certain pacing horse which was specified, he, *Jernagan*, would accept, and receive the horse instead of the wheat, in payment of the note. And *Harbor* avers that he purchased the horse and sent him to *Jernagan;* but that the latter refused to receive him, &c.

This plea is also bad. It lacks the acceptance of *Jernagan* to make it a bar to the action. Perhaps *Harbor* may have a remedy against *Jernagan* on the collateral agreement.

It appears that the defendant below offered the several matters contained in his special pleas, with some other additional matter, under the general issue. But the plaintiff below objecting, the Court sustained the objection, and excluded the evidence. This ruling was erroneous. The Court could not know beforehand what *Harbor* might be able to prove. Neither might *Harbor* himself know what was in the breast of his witnesses. Many cautious men will not disclose what they do know till they are under oath. Whether the evidence was a complete defence, was not the question to be determined at that stage of the case. That could only be settled when the testimony was judicially submitted, and the defence closed. Perhaps *Harbor* might have been able to make up the broken links in one or other of his special pleas. It was, at least, his right to try. The evidence was pertinent to the issue. If it tended to support the defence—tended to make a single link in that defence, it should have been admitted.

As the case goes back for trial, it may be proper to suggest another matter. The demurrer to the pleas goes back through the record. If the declaration is bad, the Court erred in sustaining the demurrer to the subsequent pleading. Either the authorities are at fault, or the decla-

May Term, 1853.

DICKERSON v. NELSON.

ration is insufficient on general demurrer. 1 Chitty Pl. 334.—1 Steph. N. P. 383.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

T. J. Sample and *W. A. Peelle*, for the plaintiff.

D. Kilgore, for the defendant.

DICKERSON *v.* NELSON and Another.

A certificate for canal-land which shows on its face that part of the purchase-money is unpaid, is not, under the R. S. 1843, evidence of legal title.

Where the certificate has been assigned, a levy upon and sale of the assignor's equitable interest, on a judgment rendered against him before the assignment, conveys no title to the purchaser.

A bill will lie by the assignee of the original holder to enjoin a judgment-creditor of the latter, whose judgment was rendered before the assignment, from levying an execution issued on such judgment upon the land.

Monday, May 30.

APPEAL from the *Allen* Circuit Court.

STUART, J.—*Dickerson* filed his bill in chancery to enjoin *Nelson* from levying an execution on certain real estate.

It appears that *Nelson* had recovered a judgment at law against one *Castleman*. At the time of the recovery, *Castleman* was the owner of certain lands held by canal-certificates, on which there was still part due at the land-office, so that certificates of final payment had not issued. After the recovery at law, and before execution issued, and also before final payment, *Castleman* sold the land to *Dickerson*, the complainant, and assigned the canal-land certificates accordingly. *Dickerson* paid out the land at the proper office, surrendered the certificates assigned to him by *Castleman*, and received certificates of final payment. On part of the land *Nelson* levied his execution

issued on the *Castleman* judgment. The bill was filed and the injunction granted in vacation. At the next term, on *Nelson's* motion, the injunction was dissolved, and the bill dismissed for want of equity.

Prior to the statute of 1838, land-office certificates were not evidence of legal title. *Mosier* v. *Smith*, 3 Blackf. 132. The revision of 1843 is the same, p. 455, s. 8. A certificate which shows on its face there is part yet due, is not embraced by the statute—is not evidence of legal title. The holder of such a certificate can only demand a deed or patent on certain conditions. In this respect his certificate is like a title-bond, and the title of the owner merely equitable. So this Court has hitherto regarded our canal-land certificates, and others sold on credit. *Miller* v. *Tipton*, 6 Blackf. 238.

While *Castleman* held the land, he had no title on which, under the statute, the judgment could be a lien, or the execution be levied. It is clear, then, that *Nelson's* judgment, not being a lien on the land, a levy and sale of *Castleman's* equitable interest, after the transfer to *Dickerson*, would have conveyed no title to the purchaser. *Modisett* v. *Johnson*, 2 Blackf. 431.—8 *id.* 420.—1 Ind. R. 246.

It may be said that admitting *Nelson's* judgment not to be a lien on the land, still *Dickerson's* remedy is at law and not in equity, and therefore the bill was correctly dismissed. We cannot so regard it. No doubt *Dickerson* had a remedy at law. He might have waited until the purchaser under *Nelson's* execution brought ejectment. But would this be as speedy or complete a remedy as in chancery? Must *Dickerson* fold his arms till a cloud is cast over his title, rendering his property less valuable if he wished to dispose of it? Surely not. He is entitled to more speedy and effectual relief than to wait the designs or the convenience of the purchaser on execution, to assert his title. Chancery will grant an injunction to prevent a party from using legal process for purposes of vexation or injustice. 2 Root, 109. In *Hamilton* v. *Cummings*, this question is elaborately considered by *Kent*,

May Term, 1853.

DICKERSON v. NELSON.

chancellor. That was the case of a bond admitted to be void at law, the collection of which the heir of the obligor sought to have enjoined and the bond itself cancelled. The following remarks of the chancellor apply with equal force to this case as to that:

"It is not convenient or just that such a bond should continue with a pretension to assets in the hands of the plaintiff. It might embarrass their application, or weaken their security, or poison their enjoyment. It is wrong for a person to retain a bond which is useless to him, and only an annoyance to others." 1 Johns. Ch. R. 517. So, by analogy, it would be wrong to permit *Nelson* to make a sale of land on execution which would be wholly worthless to the purchaser, and only an annoyance to *Dickerson*. In *Pettit* v. *Shepherd*, 5 Paige 493, it was held that an injunction will be granted to stay a sale on execution, though the party have a perfect defence at law against the purchaser. Equity will also enjoin a sale of real estate on execution where no valid title would pass, and where the sale would involve the title of the complainant in suspicion. 2 Ohio 470. "If," says *Walworth*, chancellor, "courts of chancery have jurisdiction to set aside a deed made on sheriff's sale, it seems to follow, as a necessary consequence, that they may interpose to prevent such a shade from being cast on the title, by enjoining the sale. 5 Paige 501. As further authority, may be cited 3 Ohio 72.—5 *id.* 178.—2 Paige 482.—6 *id.* 262.—3 How. 463. These are all cases either directly in point, or analogous in principle, to the one under consideration.

We think the Court erred in dissolving the injunction, and dismissing the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded with instructions to the Circuit Court to make the injunction perpetual.

D. H. Colerick and *R. L. Walpole*, for the appellant.

R. Brackenridge, Jr., for the appellees.

May Term, 1853.

THE STATE on the relation of HUNT *v.* LANE and Another.

THE STATE v. LANE.

In a suit upon a bond of a justice of the peace, for the breach of any condition other than for the payment of money, the breaches were required by the R. S. 1843, to be assigned in the declaration.

ERROR to the *Dearborn* Circuit Court.

Monday, May 30.

DAVISON, J.—Debt on the official bond of a justice of the peace. The declaration is on the penal part of the bond, without setting forth the condition. The defendants craved and obtained oyer of the bond and condition. The condition of the bond is, "Now, if the said *Arthur St. Clair* shall well and truly discharge the duties of said justice of the peace, and promptly and faithfully pay over all moneys collected and paid to him, to all persons legally authorized to receive the same, and at the expiration of his term of office, deliver to his successor all his books and papers belonging to said office, then this obligation to be void," &c.

Plea, that the said *Arthur St. Clair* did, in all things, well and truly discharge the duties of justice of the peace, and promptly and faithfully pay over to the relator, *Jesse Hunt*, all moneys collected by him, or received as such justice, to which the said *Hunt* was entitled, or which he had a right to receive; and that his books and papers were duly delivered over to his successor, &c.

Replication, assigning two breaches of the condition. They are, in substance, as follows: That *Hunt*, the relator, recovered a judgment before said justice against one *Miles*, for 83 dollars and 29 cents, with costs; that *Miles* fully paid the judgment and interest thereon to the justice; and that afterwards the justice, without the knowledge or consent of *Hunt*, wrongfully, &c., paid the same over to one *Wrexham West*, and wrongfully, &c., suffered and permitted him to enter on the record of said judgment, satisfaction thereof, which satisfaction so entered is as follows: "Received, *June* 9, 1840, debt and interest. *Wrexham West*," by means whereof the said *Hunt* has lost the benefit of his said judgment, &c.

May Term, 1853.

HEARICK v. DOE.

Demurrer to the replication sustained.

This demurrer was well taken. The breaches of the condition of the bond should have been assigned in the declaration. In reference to the mode of assigning breaches, there is a statutory provision. Section 143, c. 40, R. S. 1843, enacts that "when any action shall be prosecuted in any court of law upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written contract or agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought."

The terms used in the section just recited, are plain and unambiguous, and there is really no room left for construction. It requires that in actions upon any bond for the breach of any condition "other than for the payment of money," the plaintiff, in his declaration, shall assign, &c.

The condition for the breach of which this suit was instituted, was not "for the payment of money," and is, therefore, within the letter of the statute. Here, the breaches were assigned in the replication. This is not in accordance with the statute. We think the demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed with costs.

D. Macy and *J. Ryman*, for the state.

HEARICK and Others *v.* DOE on the demise of DUNN and Others.

The possession of land under a deed given upon a sale for taxes, is adverse, though the title under the deed may be invalid.

Under the R. S. 1824, a collector's deed upon a sale for taxes was *prima facie* evidence that the collector had done his duty in relation to the sale.

Where land is held adversely, the party out of possession, although his right may be valid, is incapable of conveying to another.

May Term, 1853.

HEARICK v. DOE.

ERROR to the *Switzerland* Circuit Court.

DAVISON, J.—This was ejectment for the east half of the south-east quarter of section 11, in township 2, of range 1, in *Switzerland* county.

Monday, May 30.

The suit was brought on the demise of *Isaac Dunn*, *Benjamin M. Piatt*, *Hannah C. Grandin*, and *Philip Grandin*, her husband.

The declaration was filed on the 10th of *November*, 1848.

Vienna Hearick, and others, who claimed title under one *James Hearick*, deceased, were admitted defendants.

Plea, not guilty. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

On the trial, the plaintiff proved that the land in dispute was entered by one *West*, at the *United States* land-office at *Cincinnati*, *Ohio*, on the 9th of *May*, 1818, who obtained a certificate of purchase for the same; that he sold and assigned the certificate to *John H. Piatt*, who died in the year 1822; that his executors, on the 9th of *April*, 1825, made final payment for the land, and on the 10th of *December*, 1845, a patent was issued for the same from the general land-office to the heirs of said deceased, to-wit: *Benjamin M. Piatt*, *Abram S. Piatt*, *Hannah C. Grandin*, wife of *Philip Grandin*, and *Frances Dunn*, wife of *Isaac Dunn*; that *Abram S. Piatt*, one of the heirs named in the patent, on the 16th of *April*, 1844, by deed in fee, conveyed all his interest in said land to *Isaac Dunn;* that *Frances Dunn* had died in the year 1840, leaving as her heirs *John P. Dunn*, *George Dunn*, *Jacob P. Dunn*, *Strange S. Dunn*, *Hannah Ann Dunn*, now the wife of *George Tousey*, *Sarah Jane Dunn*, now the wife of *William C. Layton;* and that the said heirs of *Frances Dunn*, on the 13th of *April*, 1848, by deed in fee, conveyed all their interest in said land to *Isaac Dunn*.

The plaintiff gave in evidence the said patent, and then offered in evidence the said several deeds to *Isaac Dunn*, to the admission of which the defendants objected, on the ground that at the time of the execution and delivery of said deeds, the grantors were out of possession

May Term, 1853.

HEARICK v. DOE.

of the land; but the Court overruled the objection, and the deeds were given in evidence.

The plaintiff here rested.

The defendants gave in evidence certain records, entries, certificates and deeds, which showed that the land in dispute was assessed for taxation, for state and county purposes, in the year 1824, as non-resident lands; that a precept was issued to the collector of taxes for that year, commanding him to collect such taxes, which precept bears date the 8th of *June*, 1824, and went into the hands of the collector on the 17th of *July* following; and that on the 6th of *October*, in the same year, the land was sold by the collector to one *Abner Clarkson*, who received a certificate of purchase; that on the 9th of *July*, 1828, *Clarkson* assigned the certificate to one *Humphry*, who, on the 15th of the same month, assigned it to *McIntire*, who, on the 9th of *September* following, assigned it to *Stephen* and *Frisby Hicks;* that on the 9th of *September*, 1828, *Henry Banta*, the then collector of taxes for *Switzerland* county, conveyed the land, by deed, to *Stephen* and *Frisby Hicks;* and they, on the 3d of *September*, 1835, by deed in fee, conveyed the same to said *James Hearick*.

There was evidence tending to prove that *McIntire* took possession of the land in the summer of 1828, and that *Stephen* and *Frisby Hicks* were in possession of it in the fall of that year, and commenced building a mill thereon, which they completed the same fall, or in the spring of 1829; that they continued in possession until they sold to said *James Hearick*, when he took and continued in possession of the land until his death; and that the defendants have been in the continued and uninterrupted possession of the same from the death of said *James* up until the trial of this cause.

The record shows that the defendants moved the Court to instruct the jury as follows:

1. That if the jury believed, from the evidence, that the defendants had possession of the land in question by virtue of a sale of it for taxes, and had a deed, although the previous and intermediate steps from the assessment

of the land for taxation to the making of the deed by the collector were not proved, it was sufficient to constitute an adverse possession. And if the jury further believe, from the evidence, that said defendants, and those under whom they hold, had been in such adverse possession of said land more than twenty years before the commencement of this suit, they should find for the defendants.

2. That if the jury believe, from the evidence, that the defendants were in the possession of said land, holding the same by virtue of a sale for taxes, and claiming it as their own at the time of the conveyances of *Piatt* and the *Dunns* and others to *Isaac Dunn*, in that case the deeds from *Piatt* and the *Dunns* and others to *Isaac Dunn*, are void, and *Isaac Dunn*, as one of the lessors of the plaintiff, cannot recover in this suit.

These instructions were refused, and the Court instructed the jury as follows: That the collector's certificate of sale is not evidence to prove that the land was advertised for sale as required by law, and that if there is no other evidence of such advertisement, the tax-title is void.

The question presented by the record is, did the Court err by refusing the instructions moved by the defendants below?

These instructions should have been given. They assume positions which are obviously correct, and are pertinent to the defence set up.

It was shown by the evidence that *Stephen* and *Frisby Hicks* entered upon the land in dispute in the year 1828; and that they, and those claiming under them, have been in the continuous possession of it ever since. Their entry appears to have been made in good faith, under an assertion of right, and a title which they believed to be good.

To constitute an adverse possession, a rightful title is not required. It has been said that, "whenever this defence is set up, the idea of right is excluded; the fact of possession and the *quo animo* it was commenced and continued, are the only tests." *Smith* v. *Burtis*, 9 Johns. R. 174.—*Jackson* v. *Newton*, 18 *id.* 355.

May Term, 1853.

HEARICK v. DOE.

The title under which the defendants held was not a nullity. It was derived from a collector's sale, and a deed made in pursuance of that sale. The land in question was assessed for taxation for the year 1824, as non-resident land, and a precept commanding the collection of taxes for that year, was regularly issued and placed in the hands of the collector. The deed was made pursuant to an act of 1824. See R. S. 1824, s. 12, p. 344. And under that act it was, at least, *prima facie* evidence that the collector had done his duty relative to the sale. *Doe* v. *Himelick*, 4 Blackf. 494.

In this view it is evident that the defendant's title, although it may have been defective and not rightful, was still sufficient to support a possession adverse to the title of the plaintiff's lessors. 9 Wend. 530.—*Jackson* v. *Newton*, *supra*.

It seems to us that an adverse possession in the defendants is fully established by the evidence; but whether it commenced within twenty years next before the commencement of this suit, was a question which should have been left to the jury, in accordance with the first instruction moved by the defendants.

The possession of the defendants being adverse at the time the several deeds were executed and delivered to *Isaac Dunn*, it follows that these deeds are void.

The law is settled, that where land is held adversely, the party out of possession, although his right may be valid, is incapable of conveying to another. *Roseboom* v. *Van Vechten*, 5 Denio 530.—4 Kent's Com. 449.—*Doe* v. *Crocker*, 2 Ind. R. 575.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Kelso and *J. W. Gordon*, for the plaintiffs.

J. Sullivan, for the defendant.

REECE *v.* HOYT.

When a partner sells to a stranger his interest in the partnership goods, the stranger cannot, on refusal of the co-partner on demand to admit him as a partner, maintain replevin for the goods.

The sale by a partner of his interest in the partnership effects, dissolves the partnership, and the partner who has not disposed of his interest, has a right to the possession of the effects for the purpose of settling up the partnership, and the purchaser cannot interfere unless for good cause shown.

APPEAL from the *Randolph* Circuit Court. *Monday, May 30.*

PERKINS, J.—Replevin by *Thomas W. Reece* against *Beniah C. Hoyt*, for a lot of goods. Pleas, the general issue; property in the defendant; property in the defendant and one *Patty*, as partners. Replications severally to the second and third pleas, denying that the property was in the defendant, and that it was in the defendant and one *Patty*, and re-affirming that it was in the plaintiff.

Trial by jury, verdict for the defendant, motion for a new trial overruled, and judgment on the verdict, and for a return of the property.

The evidence is upon the record, and shows that *Hoyt* and *Patty* were partners in a clothing store; that *Patty* sold his interest in it, without *Hoyt's* consent, to the plaintiff *Reece;* that *Reece* demanded to be admitted as a partner in the place of *Patty*, and that *Hoyt* refused to admit him; whereupon *Reece* brought replevin for the stock of goods in *Hoyt's* hands.

The sale in this case by *Patty* of his interest in the partnership, was a dissolution of the partnership, as between the partners; and the remaining partner, *Hoyt*, could not be compelled to receive a stranger as a partner with him; for partnership is founded on personal confidence. Coll. on Part., Perk. ed., p. 96, n. 1.

Upon a dissolution of a partnership, the surviving or continuing member of it has a right to the possession of the effects of the concern for the purpose of settling it up; see *McDonald* v. *Beach*, 2 Blackf. 55; and that, too,

May Term, 1853.

Reece v. Horr.

without interference, unless for good cause shown, on the part of such as may have purchased the shares of retiring partners. In the case of *McGlesney* v. *Cox*, Phil. Law Reg., vol. 1, p. 34, a court of equity refused an injunction and the appointment of a receiver on the application of such a purchaser, where no cause was shown but the refusal of the continuing members to permit him to interfere in the affairs of the concern. The Court say:

"Whatever may be the rights of a partner upon the dissolution, it is clear that he cannot transfer to a stranger his interest in the partnership, and thereby introduce him into the concern as a partner. (*Mason* v. *Connel*, 1 Whar. 381.—*Cochran* v. *Perry*, 8 W. and S. 262.—*Horton's* Appeal, 1 Harris 67). Can he, then, by a transfer, convey to a stranger those rights which he possesses only because he is a partner? The stranger thus coming into the concern may be entitled to use appropriate means to ascertain the situation of the partnership; he may demand an account, and, perhaps, an immediate settlement; but, not being a partner, he has no right personally to interfere, and the refusal of the remaining partners to permit him to do so, is no sufficient reason for depriving them of any rights to which their position entitles them. The remaining partners, after a dissolution thus effected, are entitled to hold possession for the purpose of paying off the debts and winding up the assets of the firm, (1 Harris 67); and in a case *where no improper conduct is charged* in the complainant's bill, and where everything like mismanagement is fully refuted by the counter affidavits presented, and where it further appears that the complainant has had further opportunity to investigate the situation of affairs, and to ascertain the value of the interest claimed by him, it would be a harsh exercise of the power of the Court to deprive parties of their rightful control over their own property, without some more efficient cause shown than appears in the present case."

Per Curiam.—The judgment is affirmed with costs.

T. J. Sample, for the plaintiff.

D. Kilgore, for the defendant.

May Term, 1853.

TRAVIS v. BARKHURST.

4 171
128 465

As a general rule, surprise from unexpected evidence adduced by the adverse party, is not a sufficient ground for a new trial.

Replevin by *A.* against *B.* for a horse. On the trial, *B.* having proved that the horse came into his possession by a purchase from one *C.*, offered to prove a conversation between *C.* and himself soon after the trade occurred, in relation thereto. It was not shown that *C.* was the agent of *A.* when the sale to *B.* was made. *Held*, that the Court correctly refused to admit the evidence.

A witness for the defendant having testified at the trial to the general bad character of a witness for the plaintiff for truth and veracity, the latter, at the rising of the Court, assailed and beat him therefor. The counsel for the plaintiff was permitted to argue that the fact of such beating was an evidence of the credibility of the assailant. The Court instructed the jury, in effect, that what had been said by the plaintiff's counsel as to said attack was not in evidence, but was a matter of public notoriety, though not a matter properly before the jury; but that, in the opinion of the Court, a man who had the courage and will thus to meet a charge, was usually one who had such a sense of honor that he would not place himself in a position where a charge could be justly made, &c. *Held*, that the instruction was impertinent, and pernicious in its tendency, and ought not to have been given.

ERROR to the *Tippecanoe* Circuit Court.

PERKINS, J.—Replevin by *Barkhurst* against *Travis* for a bay mare. Pleas, the general issue, and property in the defendant. Issues of fact. Jury trial, and verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict. *Monday, May 30.*

It is claimed that said judgment should be reversed:

1. Because of the refusal of the Circuit Court to grant a new trial on account of the defendant having been surprised by the testimony of certain of the plaintiff's witnesses. As a general rule, such surprise is not a sufficient ground for a new trial; and we see nothing in the record satisfying us that the Court erred in the present case in this particular. See *Graeter* v. *Fowler*, 7 Blackf. 554;—*Cummins* v. *Walden*, 4 *id.* 307;—and 2 Swan's Pr. 924, where the law can be found on this point.

2. Because of the refusal of the Circuit Court to permit the defendant to give certain evidence.

The mare replevied by the plaintiff, *L. Barkhurst*, got

May Term, 1853.

TRAVIS v. BARKHURST.

into the possession of the defendant, *Travis*, through a purchase of her by him from one *Daniel Bugher*, who had her in possession; and on the trial said defendant offered to prove what he and said *Bugher* said about the trade soon after it had been consummated, but the Court would not permit him to do so.

Had it been proved that *Bugher* was acting in the trade as the agent of said *L. Barkhurst*, then his declarations "at the very time of the contract," would have been admissible in evidence as a part of the *res gestæ*. Without such proof, his declarations would have been mere hearsay. Story on Agency, p. 153.—*Caldwell* v. *Williams*, 1 Ind. R. 405.—*Bland* v. *The State*, 2 *id.* 608. If a man steal a horse and sell it, his declarations, even while having the property in possession, cannot, certainly, be given in evidence in bar of the right of the real owner. See *Collis* v. *Bowen*, 8 Blackf. 262.

3. Because the Court gave an erroneous instruction to the jury.

The defendant introduced testimony, on the trial, to impeach one of the plaintiff's witnesses, viz., *Nathan Barkhurst*. Several witnesses swore that his character was bad, and that they could not believe him on oath. The first one testifying to this effect, and whose testimony was given just before an adjournment of the Court, was *Charles Vanhorn*. He swore that he had "known witness *Barkhurst* a long time; was acquainted with his character for truth and veracity; it was bad, and, from that character, he would not be willing to believe him on oath; but he had not lived near him for three or four years, and did not know what his character for truth and veracity was at that time, in the neighborhood where he was living."

On the adjournment of the Court, said *Barkhurst* assaulted and beat witness *Vanhorn*, for giving the testimony above set out, and, in his closing address to the jury trying the cause, the counsel for the plaintiff was permitted to use the fact of such beating as an argument to show that said *Barkurst* was a credible witness; and, in charging the jury, the Court stated "that what had been

said by plaintiff's counsel as to the attack made by witness *Barkhurst* upon witness *Vanhorn*, was not in evidence, but was a matter of public notoriety, though it was not properly a matter before the jury; that in the opinion of the Court, a man who was guilty of a charge made against him of any kind, was not apt to resent the charge; but that when a charge of any kind was made unjustly and without cause, the party charged would probably resent the insult at once by a blow; that the man who had the necessary courage and will thus to meet a charge, was usually one who had so nice a sense of honor that he would not place himself in a position where a charge could be justly made."

The latter part of this instruction was impertinent and should not have been given. It was, also, calculated to influence and mislead the jury. It did not fairly represent the state of the case. It assumes, (for we must consider the instruction as applying to the present case), that *Vanhorn* had made a charge, and a false one, against *Barkhurst*, which justified him in inflicting personal violence upon the former, and left the impression on the minds of the jury that having done so, his testimony was entitled to credit, notwithstanding it had been impeached. But *Vanhorn* had made no specific charge against *Barkhurst*. He had testified to nothing but his general character in the community, and that, from that character, he could not believe him on oath; and we think the more reasonable inference from the fact of *Barkhurst* assaulting the first witness that thus testified is, that he was conscious of the truth of the testimony, and hoped, through the fear of personal violence, to deter others from confirming it.

The influence of instructions like the foregoing, would be pernicious, tending to turn courts of justice into scenes of violence; and they should never be given.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Jones, for the plaintiff.

J. Pettit and *S. A. Huff*, for the defendant.

May Term, 1853.

HUNT v. LEWIS.

HANNAH v. HENDERSON.

Upon an appeal from the judgment of a justice of the peace, the defendant, if he reduces the justice's judgment more than 5 dollars, is entitled, under the R. S. 1843, to a judgment for costs.

Tuesday, May 31.

ERROR to the *Ohio* Circuit Court.

DAVISON, J.—*Lewis* sued *Hunt* before the mayor of *Rising Sun*, who was *ex officio* a justice of the peace, and recovered judgment for 25 dollars and 50 cents. *Hunt* appealed. In the Circuit Court *Lewis* remitted 5 dollars and 15 cents of the judgment before the mayor. The cause was submitted to a jury. Verdict in favor of *Lewis* for 11 dollars and 57 cents, and judgment against *Hunt* for that sum and costs of suit. This judgment for costs is erroneous. The amount recovered before the mayor was reduced, upon the appeal, more than 5 dollars. *Hunt* was, therefore, entitled to a judgment for costs. R. S. 1843, c. 47, s. 175.—2 Ind. R. 288.—8 Blackf. 589.

Per Curiam.—So much of the judgment as gives costs to the plaintiff below, is reversed, with costs. Cause remanded with directions to the Circuit Court to render judgment for costs in favor of the defendant below.

J. W. Spencer and *E. Coburn*, for the plaintiff.

HANNAH v. HENDERSON.

In a declaration for the breach of the covenant of warranty in a conveyance of land, an eviction must be alleged.

The existence of paramount title in a stranger when the conveyance was made, does not, of itself, show an eviction.

The fact that land is subject to the lien of an outstanding judgment at the time of its conveyance, does not, of itself, authorize an action for the breach of the covenant of warranty.

Neither does the fact that an execution has been awarded upon the judgment against the land.

The yielding to the paramount title of a stranger, by giving up possession or buying in such title and continuing possession under it, is evidence of an eviction.

Tuesday, May 31.

ERROR to the *Marion* Circuit Court.

DAVISON, J.—Covenant by *Hannah* against *Henderson*. The declaration alleges, *inter alia*, that the defendant, on the 6th of *June*, 1838, by deed in fee, conveyed to the plaintiff certain real estate therein described, and situate in *Madison* county; and that the defendant, by said deed, covenanted for himself, &c., the aforesaid real estate forever to warrant and defend to the said plaintiff, his heirs, &c., against the claim or claims of all and every person whomsoever.

The breach assigned is, that one *John Bullard*, in the month of *August*, 1830, obtained a judgment against one *John Berry*, in the Quarter-session Court of the county of *Granger*, and state of *Tennessee*, for 1,225 dollars and 97 cents, with costs; that after said judgment was obtained, the said *Berry* died intestate at said county of *Madison*, seized in fee of the undivided half of the premises described in the deed; that at the *February* term, 1841, of the *Madison* Circuit Court, the said *Bullard* recovered a judgment upon the judgment so obtained in the said Quarter-session Court, against the administrator of said deceased, for 1,848 dollars and 50 cents, with costs, &c.; upon which last judgment execution was issued, and afterwards returned "no property;" and that the said *Bullard* afterwards, on his petition filed in the same Court against the administrator, heirs, and terre tenants of said deceased, obtained an order that execution be issued on the said last judgment, and levied on the undivided half of the real estate described in said deed, and that the same should be sold for the satisfaction of said judgment, interest, and costs; and that the plaintiff, to avoid a sacrifice of said real estate on execution, (much of which he had conveyed away by deeds of general warranty), and still further ruinous litigation, was compelled to pay off said

May Term, 1853.

HANNAH v. HENDERSON.

judgment, interest, and costs, to the amount of 3,000 dollars.

The defendant craved oyer of the covenant, and demurred to the declaration. Demurrer sustained, and judgment for the defendant.

The demurrer admits the facts set forth in the declaration. The only covenant contained in the deed is a general warranty. And the question presented by the record is, should the plaintiff have alleged an eviction?

The plaintiff contends that an action may be sustained for a breach of this covenant without actual eviction, if there be such a claim against the premises that by a prosecution of it to final judgment or execution, an eviction would be the consequence.

The law relative to the covenant of warranty is thus laid down by Mr. *Greenleaf*: "A breach of this covenant is proved only by evidence of actual ouster or eviction; but it need not be with force; for if it appears that the covenantee has quietly yielded to a paramount title, whether derived from a stranger or from the same grantor, either by giving up possession, or becoming tenant to the rightful claimant, or has purchased the better title, it is sufficient." 2 Greenl. Ev. s. 244. The rule here laid down we consider settled. See note to *Foote* v. *Burnet*, 10 Ohio R. 317.

In this case there was neither ouster nor eviction shown by the declaration. It is true, there are no formal terms prescribed in which that averment is to be made; still it was, no doubt, requisite to have alleged, substantially, an eviction. 10 Wheat. 449.—4 Kent's Com. 479.

The plaintiff has failed to bring his claim against the defendant within the covenant. He has done nothing more than pay off an incumbrance resting upon one undivided half of the land. The fact that an execution had been awarded, does not vary the case. *Kerr* v. *Shaw*, 13 Johns. R. 236.—Mart. & Yerg. R. 48.—4 Halst. 141.

It appears that the paramount title to the one undivided half of the land in question is still in the heirs of *Berry*. The mere existence of that title could not have consti-

tuted an eviction of the plaintiff. If he had yielded to it by giving up possession, or bought it in and continued his possession under it, this action might have been sustained. But it seems to us, that the mere payment of the judgment to avoid a sacrifice of the land on execution, and even a consequent eviction, will not authorize the plaintiff to sustain this suit against the grantor on his covenant.

We think the demurrer was correctly sustained.

Per Curiam.—The judgment is affirmed with costs.

J. Davis, for the plaintiff.

O. H. Smith and *S. Yandes*, for the defendant.

JARBOE *v.* KEPLER.

A party who has been sued upon his notes, and trusting to the assurances of the plaintiff that payments made thereon had been properly credited, has suffered judgment to pass for the full amount, without examining the notes, is not in a condition to obtain relief in chancery.

APPEAL from the *Wayne* Circuit Court.

Tuesday, May 31.

STUART, J.—It appears that *Kepler* had recovered a judgment at law against *Jarboe*, and that there had been a return of *nulla bona*. The notes which were the foundation of the recovery at law, had been given in the purchase of certain lands. The bill now before us seeks to subject the equity of *Jarboe* in these lands to execution.

In his answer, *Jarboe* claims that the recovery at law is for more than was due; that certain payments had been made by him which were not credited; that trusting to the assurances of *Kepler* that the credits were all properly given, he suffered the judgment to pass without examin-

May Term, 1853.

KINGSBURY v. VANCE.

ing the notes. The credit claimed by *Jarboe*, is 24 dollars and 33 cents. The Court sustained the exception taken to this part of the answer. Decree in favor of *Kepler* for 1,046 dollars and 98 cents, &c.

We are of opinion that *Jarboe* is not entitled to the relief sought, even if the mode in which he presents his case is waived. His defence was properly at law. He had his day in Court. If he neglected to examine the notes and avail himself of all proper credits, when he had an opportunity to do so, he is not in a position to seek relief in chancery. *Parker* v. *Morton*, 5 Blackf. 1, and the authorities there cited. Nor does *Jarboe* bring himself within any of the exceptions to this rule.

Per Curiam.—The judgment is affirmed with costs.

J. B. Julian, for the appellant.

J. S. Newman and *J. P. Siddall*, for the appellee.

KINGSBURY and Others *v.* VANCE for the use of TOUSEY.

Tuesday, May 31.

ERROR to the *Marion* Circuit Court.

STUART J.—This was an action of debt on a delivery bond, conditioned to deliver certain property levied on, at the time and place of sale, &c.

General demurrer to the declaration overruled, and judgment for *Vance*.

Several objections are taken by the plaintiffs in error. One is, that the declaration does not aver a demand of the property at the time and place, &c. In this the plaintiffs in error seem to be mistaken. By the terms of the bond, the delivery was to be at the store of *A. Wallace*, in *Indianapolis*, on the 20th day of *May*, 1851. The declaration avers that the sheriff was present at, &c., and demanded the property, &c., and proceeds to negative the

delivery. This seems sufficient. It is not to be presumed that the objection goes to the fact of the sheriff making the demand by his deputy.

The other objections are equally unfortunate. Like the one just considered, the points which the objections would raise, have no relation to the facts—do not arise in the record. The demurrer to the declaration was correctly overruled.

It is not necessary to decide the question raised in argument, whether, in such cases, a demand by the sheriff was necessary. The authority referred to, *English* v. *Finney*, 5 Blackf. 298, does not seem to support the position for which it was cited.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

R. L. Walpole, for the plaintiffs.

L. Barbour and *A. G. Porter*, for the defendant.

Barkwell *v.* The State on the relation of Robinson.

The prosecuting attorney of the fourth judicial circuit, who was elected under a law of 1849, (Laws 1849, p. 95), was entitled to serve during the full period of the term for which he was elected, notwithstanding the election, before the expiration of his said term, of a prosecuting attorney for that circuit, under the act of 1851, (Laws 1851, p. 141).

ERROR to the *Vanderburgh* Circuit Court.

Tuesday, May 31.

Perkins, J.—At the *September* term, 1851, of the *Vanderburgh* Circuit Court, the following information, in the nature of a writ of *quo warranto*, was filed in said Court:

"*Andrew L. Robinson*, prosecuting attorney for the fourth judicial Circuit of the state of *Indiana*, who, for

May Term, 1853.

BARKWELL v. THE STATE.

the state of *Indiana*, on his own relation, prosecutes in this behalf, comes into Court in his own proper person, and, for the said state of *Indiana*, on the relation of the said prosecuting attorney, gives the Court here to understand and be informed that *Herman G. Barkwell*, heretofore, to-wit, on the 1st day of *September*, A. D. 1851, wrongfully and unlawfully did usurp and intrude into the office of prosecuting attorney for the said circuit in the state aforesaid, and from the day and year aforesaid until the present time, unlawfully and wrongfully did then and there hold the said office of prosecuting attorney, he the said *Barkwell* then and there not being duly elected to the said office, nor entitled to hold or exercise the same; to the great prejudice, damage, and injury of the said *Andrew L. Robinson*, who, of right, holds the said office, and who alone is entitled to exercise the same according to law; and to the damage of the state of *Indiana*.

"Wherefore the said prosecuting attorney, who, for the said state of *Indiana*, on his own relation, prosecutes, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said *Herman G. Barkwell* in this behalf, to compel him to answer to the said state of *Indiana* by what authority he claims to usurp, hold, and exercise the office aforesaid. *A. L. Robinson.*"

Barkwell pleaded as follows:

"*Herman G. Barkwell*, the defendant herein, comes into Court, and, having heard the information read to him, for plea thereto says, that the said state of *Indiana* ought not further to prosecute her said information herein against him, because he says he was elected prosecuting attorney in and for the fourth judicial circuit of the state of *Indiana*, at the last general election, held on the first *Monday* of *August*, 1851; and that he was duly commissioned by the governor of the state of *Indiana* as such prosecuting attorney, on the 1st day of *September*, 1851, for the term of two years from said date, and until his successor should be elected and qualified; and that on the 8th day of *September*, 1851, he presented his commission

in open court, in the *Posey* Circuit Court, in said circuit, and gave bond as prescribed by law, to the acceptance of the president judge of the said fourth judicial circuit, and took the oath of office as such prosecuting attorney, in conformity with the provisions of law, which oath was then and there by said president judge indorsed on the back of said commission; and that he, said defendant, then and there, under the direction and by the order of said Court, entered on the discharge of his duties as such prosecuting attorney, and continued in the discharge thereof up to the time of filing the information herein by said *Andrew L. Robinson*, attorney and relator for the state; all of which the said defendant is ready to verify; wherefore he prays judgment, and that by the Court here said information may be dismissed, and said defendant permitted to proceed in the discharge of his duties as such prosecuting attorney, &c. *H. G. Barkwell.*"

To this plea the plaintiff replied as follows: "And the said plaintiff, for replication to the said plea of the said defendant, says that the plaintiff ought not to be barred or precluded from having, prosecuting, or maintaining her said information against the said defendant by reason of anything in the said plea alleged, because the said plaintiff says that the said *Andrew L. Robinson* was elected prosecuting attorney of and for the fourth judicial circuit of the state of *Indiana* at the general election held on the first *Monday* of *August*, A. D. 1849, and, in pursuance of said election, the said *Robinson* was, on the 23d day of *August*, A. D. 1849, duly commissioned by the governor of the state of *Indiana*, as such prosecuting attorney, for the term of three years from the day and year last aforesaid, and until his successor should be elected and qualified; and afterwards, to-wit, on the 1st day of *September*, A. D. 1849, the said *Andrew L. Robinson* presented his commission to the president judge of the said fourth judicial circuit, and at the same time presented to the said judge an official bond, executed by the said *Robinson* and his sureties, and conditioned according to the requirements of the statutes in such case made and

May Term, 1853.

BARKWELL v. THE STATE.

provided; and the said judge thereupon, on the day and year last aforesaid, accepted and approved of said bond and security, and administered to said *Robinson* the oath of office as such prosecuting attorney, as required by the constitution of the state and the statutes in such case made and provided, which oath was then and there by said president judge, indorsed on the back of said commission, and thereby the said *Robinson* then and there became and was the duly elected, commissioned and qualified prosecuting attorney of and for the said fourth judicial circuit for the said term of three years, which time has not yet expired or elapsed; and the said plaintiff further avers that the said *Robinson* has never, at any time, resigned or vacated his said office, nor has he, in any way, been removed therefrom; all of which the said plaintiff is ready to verify, &c.; wherefore he prays judgment, &c. *A. L. Robinson.*"

To this replication the defendant filed a general demurrer, in which the plaintiff joined. The Court overruled the demurrer, held *Robinson* the rightful prosecuting attorney, and gave judgment of ouster against *Barkwell*, the defendant.

In considering this question, it will be necessary to glance at the history of legislation for a few years past, in reference to prosecuting attorneys.

By the law of 1831, prosecuting attorneys for the several judicial circuits of the state, were elected by the legislature for three years, and received their salaries from the state treasury.

By the law of 1843, they were elected by the voters of the several judicial circuits for two years, and received their salaries from the state treasury.

By the law of 1847, a prosecuting attorney was to be elected in each county in the state, by the voters thereof, and to hold his office for three years, receiving his compensation by way of docket-fees, without any salary from the state.

In 1849, a local law was passed, enacting that the voters of the fourth and eighth judicial circuits should

elect prosecuting attorneys for said circuits, with the exception of the county of *Cass*, in the fourth circuit, who should hold their offices for three years, receiving no compensation from the state treasury. The election was to take place on the first *Monday* in *August*, 1849.

Under this law, *A. L. Robinson* was elected, on the first *Monday* in *August*, 1849, prosecuting attorney for three years, for the fourth judicial circuit aforesaid, and was qualified. His term of office extended, therefore, under said election, to *August*, 1852.

But, in 1851, on the 14th of *February*, a law was enacted, repealing the law of 1847 throughout the state, wherever it was in operation, including the county of *Cass*, in the eighth circuit, which county had not been embraced by the local law of 1849, and reviving and declaring in full force that part of the act of 1843 making prosecuting attorneys elective by the voters of the several judicial circuits every two years, and that part of the act of 1831 prescribing the duties of said prosecuting attorneys, and making their salaries payable out of the state treasury; and further declaring that the first election under said act of 1851 should be on the first *Monday* in *August* following, being the annual election day for the year 1851. The acts thus revived were general and operative in every county of the state; and the first question presenting itself is, whether they have the effect to repeal the local act of 1849 in the fourth and eighth judicial circuits.

Their provisions are utterly irreconcilable with the provisions of said act of 1849, and, we think, necessarily repeal it.

Such being the case, as Mr. *Robinson* was holding his office of prosecuting attorney under and by virtue alone of said repealed act, he necessarily went out of that office with the expiration of said act, unless there was some saving clause in reference to existing incumbents of office. As it would be but just to said incumbents that they should be permitted to serve out the terms for which they were elected, it will be right for the Court,

May Term, 1853.

LOVELAND v. JONES.

if by a reasonable construction of the laws that result can be effected, to preserve their terms to them. We think this can be done.

The act of 1843, R. S. 1843, p. 1048, contains this proviso, viz., that it shall not "be so construed as to prevent the present prosecuting attorneys from holding their said office during the term for which they have been elected." Now, this proviso was repealed by the act of 1847, or it was not. If it was repealed by that act, it was revived by the act of 1851, under which *Barkwell* was elected, for that act revives "so much" of the act of 1843 as was repealed by the act of 1847. If it was not repealed by the act of 1847, it has continued a standing law of the state since 1843, as no other act has repealed it, and would, hence, from a part of all new laws relative to the tenure of office of prosecuting attorneys.

Per Curiam.—The decree is affirmed with costs.

H. G. Barkwell, for the plaintiff.

C. Baker, for the state.

LOVELAND and Another v. JONES.

An attorney was made a party to a motion to set aside an execution. Upon service of notice, he appeared to the motion, without objection, and submitted to a judgment for costs, without excepting to the same. *Held*, on error, that the judgment must be presumed to be right.

It is competent for a Court, where an attorney has improperly caused an execution to be issued, to tax him with the costs of a motion to set it aside.

Tuesday, May 31.

ERROR to the *Miami* Circuit Court.

PERKINS J.—Motion to set aside an execution.

The record in the cause shows a judgment in the

Miami Circuit Court in favor of *Horatio H. Hall* against *John N. Jones*, rendered in a suit in which *Loveland* and *Ross* were attorneys for the plaintiff. It further shows a motion to set aside an execution said to have been issued on said judgment, and also a cross motion for leave to amend said execution. It shows that the latter motion was denied, and the former granted. It appears that separate notices of the motion to set aside said execution were served on *Hall*, the plaintiff in the judgment, and on *Loveland* and *Ross*, his attorneys, and that the Court rendered separate judgments on said notices, one against said *Hall*, and one against said *Loveland* and *Ross*, each being for the costs of the motion setting aside the execution. There is no bill of exceptions in the case, and we are, consequently, not advised as to the reasons governing the action of the Court below. *Loveland* and *Ross* bring the case to this Court, and complain of the judgment for costs against them.

The record shows that *Hall* appeared in person, in answer to the notice of the motion served on him; and that subsequently *Loveland* and *Ross* appeared in person in answer to the notice of the motion to set aside above mentioned, served on them; that the motion was docketed against them personally, and submitted to and decided by the Court on its merits. No objection appears to have been made below by them to the proceedings, and they have brought a transcript of all of those proceedings here. Why there was a separate docketing of the motion against the attorneys—why those attorneys appeared to it without objecting or informing the Court upon the subject, &c., we know not.

The conduct of the attorneys may have been such, in the premises, as to justify the visiting of them with costs, and, in the absence of evidence to the contrary, we must so presume. And if their conduct did justify such visitation, it was in the power of the Court to inflict it upon them. *Kane* v. *Van Vranken*, 5 Paige 62.—*Powell* v. *Kane*, *id.* 260.

May Term, 1853.

BRADLEY v. BEARSS.

Per Curiam.—The judgment is affirmed with costs.

D. D. Pratt, for the plaintiff.

A. A. Cole, for the defendant.

BRADLEY *v.* BEARSS and Another.

Writs of error, by the R. S. 1843, lie only to final judgments and decrees. The only mode of bringing before the Supreme Court the order or decree of an inferior Court granting or dissolving an injunction is, by the R. S. 1843, by appeal.

Tuesday, May 31.

ERROR to the *Miami* Circuit Court.

ROACHE, J.—*Bradley* filed a bill in chancery in the *Miami* Circuit Court, praying for an injunction restraining *Bearss* and *Spencer* from proceeding in certain suits then pending, as well as from commencing others. The associates, in vacation, granted the prayer of the bill, and made the order. At the succeeding term of the *Miami* Circuit Court, the president judge, on motion, dissolved the injunction. From this interlocutory order, the complainant below prayed an appeal, which was granted; but having failed to perfect his appeal, filed the record here and prosecutes it as upon a writ of error.

The dissolution of the injunction by the Circuit Court, is the only error complained of.

Writs of error lie only to final judgments and decrees. R. S. 1843, p. 629, s. 11. The only mode of bringing before this Court the order or decree of an inferior Court granting or dissolving an injunction, is by appeal. R. S. 1843, p. 636, s. 70. *Cain* v. *Foote*, 8 Blackf. 454. The writ of error must therefore be dismissed.

Per Curiam.—The writ of error is dismissed with costs.

D. D. Pratt, for the plaintiff.

O. H. Smith and *S. Yandes*, for the defendants.

JAMISON v. JARRETT.

A justice of the peace, upon an appeal from his judgment to the Circuit Court, filed all the papers in the cause in the clerk's office, ten days before the first day of the term, except the cause of action, but omitted to file it till a few days afterward, and the cause was docketed for that term. The appellee moved that the cause should be stricken from the docket of that term and docketed for the ensuing term. *Held*, that the motion should have been sustained.

A suit upon a note, must, under the R. S. 1843, be brought in the name of the party having the legal interest.

A note payable to the payee or bearer, unless payable at a chartered bank within this state, can only be transferred, under the R. S. 1843, by indorsement.

ERROR to the *Delaware* Circuit Court.

Tuesday, May 31.

ROACHE, J.—This was an action of debt commenced before a justice of the peace on the following note:

"Six months after date, I promise to pay *Spencer Lewis*, or bearer, the sum of 66 dollars and 66 cents, for value received, with interest from date. *June* 5, 1849. *Eli J. Jamison*."

Upon the note was the following indorsement: "*Hiram E. Bowen*." "Pay *Daniel Jarrett*. *June* 16, 1849. *Thomas Kirby*."

On the third day of the term, being the day for which the cause was docketed for trial, and being the first term after the appeal had been taken, on the first calling of the cause, it appeared that all the papers in the cause had been filed in the clerk's office by the justice, more than ten days prior to the first day of the term, except the cause of action, which had not yet been filed. And thereupon the defendant below moved the Court that the cause be struck from the docket of the present term, and be docketed for trial at the then next ensuing term, on the ground that the cause of action, to-wit, the note sued on, with its indorsements, had not been filed ten days before the first day of the term. Which motion the Court overruled, and ordered the cause to remain on the docket, and stand for trial at the then present term.

May Term, 1853.

JAMISON v. JARRETT.

Thereupon, on motion of the plaintiff below, the Court granted a rule against the justice to send up the original cause of action. On the fifth day of the term, the justice certified up the note with its indorsements above set out, as the only cause of action in the case. Upon the next calling of the cause, the defendant below moved to dismiss the suit for want of a sufficient cause of action, on the ground that the legal title in the note was still in *Lewis*, the payee, he never having assigned it to *Jarrett*, or to any one else, and that there was no declaration filed to show that *Jarrett* had any title to, or connection with, the note. The Court overruled the motion, the cause went to trial, the only evidence introduced by either party being the note and indorsements, and a judgment was rendered for the plaintiff for the amount of the principal and interest due on the note.

This judgment must be reversed on both grounds.

The Court should have sustained the defendant's motion to strike the cause from the docket of the then present term, and have directed it to be docketed for trial at the next ensuing term. See R. S. 1843, p. 890, s. 166.

The defendant's motion to dismiss the suit for want of a sufficient cause of action, should also have prevailed. A suit on a note must be brought in the name of the party having the legal interest. The legal interest in the note sued on, in the absence of any indorsement by *Lewis*, remains in him. The fact that the note is payable to *Lewis*, or bearer, makes no difference. Not being payable at a chartered bank within the state, it could be transferred only in the mode prescribed by the statute, that is, by indorsement. See *McNitt* v. *Hatch*, 4 Blackf. 531.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

T. J. Sample, for the defendant.

May Term, 1853.

HENLINE v. HALL.

THE STATE on the complaint of HARRIET L. DRAKE *v.* DEMOSS.

It was not necessary, under the R. S. 1843, that the affidavit, upon a complaint for bastardy, should state the complainant's place of residence.

ERROR to the *Pulaski* Circuit Court.

Thursday, June 2.

ROACHE, J.—This was a case of bastardy, instituted on the complaint of *Harriet L. Drake*, before a justice of the peace, on the 25th day of *March*, 1848. Upon an examination before the justice, the defendant was adjudged to be the father of the bastard, and recognized to appear at the next term of the Circuit Court of *Pulaski* county, to answer the accusation.

The defendant appeared in the Circuit Court and moved to *quash the proceeding*, on the ground that the affidavit filed before the justice was defective in not sufficiently alleging the residence of the complainant. The Court sustained the motion, and dismissed the complaint.

This was erroneous. Under the act of 1843, R. S. p. 363, s. 1, it was not necessary that the affidavit should state the complainant's place of residence. See *The State &c.* v. *Gray*, 8 Blackf. 274. (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Gooding, for the state.

W. Z. Stuart and *W. Wright*, for the defendant.

(1) STUART, J., having been concerned as counsel, was absent.

HENLINE *v.* HALL.

By the common law, a parol contract for the sale of chattels is valid; and the statute of frauds changes that rule only as to sales amounting to more than 50 dollars.

May Term, 1853.

HENLINE v. HALL.

A. sold a colt to *B.*, by parol, for 20 dollars, the parties agreeing that the colt should run with the mare, which belonged to *A.* and was in his possession, until it was weaned, when it should be delivered to *B.*, who was then to pay the price stipulated. When the colt was weaned, *B.* tendered the 20 dollars, in specie, and demanded the colt. *Held*, that the contract vested the property in *B.*, and placed it at his risk, from the moment when the bargain was closed, without any actual payment or present delivery; and, that *A.*, from the time when the contract was made until the delivery of the colt to *B.*, was a bailee.

Thursday, June 2.

ERROR to the *Wells* Circuit Court.

ROACHE, J.—*Hall* commenced an action of replevin against *Henline* before a justice, for a colt of the alleged value of 25 dollars. The case was taken to the Circuit Court by appeal, where there was a jury trial, and a verdict and judgment for the defendant in error. The evidence was all spread upon the record by a bill of exceptions.

From the evidence, it appears that sometime before the commencement of the suit, *Henline* sold the colt to *Hall* for 20 dollars. It was further agreed that the colt should run with the mare, which belonged to *Henline* and was in his possession, until it was weaned, at which time it should be delivered to *Hall*, who was at that time to pay the price stipulated; that when the colt was weaned, and before the commencement of this suit, *Hall* tendered the price agreed on, 20 dollars, in specie, and demanded the colt. *Henline* refused either to receive the money or to allow *Hall* to take the colt. The contract was by parol.

Upon this state of evidence, the Court gave the following instructions to the jury:

1. "If you believe, from the evidence in this case, that a bargain of sale was made for the colt between the plaintiff and defendant, that the price for and time of delivery of the colt was agreed upon, and time of payment fixed, it was sufficient in law to pass the property.

2. "If the plaintiff at the time by the bargain of sale that the money was to be paid and colt delivered, tendered the money in gold or silver—the amount stipulated by such bargain of sale to be the price—and made a de-

mand of the colt, it gave him, the plaintiff, the right of possession as against the defendant."

No brief has been filed by the plaintiff informing us in what the error complained of consists.

We are of opinion that the instructions are correct. There is no conflict in the testimony. The contract was clearly proved, and all its terms and conditions were definite and distinct.

By the common law, a parol contract for the sale of chattels was valid. The statute of frauds changes that rule only as to sales exceeding in value 50 dollars. The price of the colt agreed upon being less than that sum, the contract is not affected by the statute, and is as valid as if it had been reduced to writing. Nor is this case to be assimilated to those in which it is held that the property was not changed because something remained to be done by the seller to the article sold. Upon looking into the cases on this subject, it will be found that the principle established by them is this: that under a parol sale of goods, there is no change of property if any act remains to be done by the seller to place the thing sold in a condition for delivery, as, for example, to ascertain the particular chattel, or to set apart the specified goods out of a quantity of similar kind, or to determine the number or quantity by measurement, &c. There would be no change of property until those acts were done. See *Whitehouse* v. *Frost*, 12 East 614.

In the present case nothing remains to be done by the seller for any of these purposes. The contract definitely fixed the price, the time for its payment, and designated the particular colt sold. This was sufficient to vest the property in the buyer, and place it at his risk from the moment the bargain was closed, without any actual payment or present delivery. In *Dixon* v. *Yates*, 5 B. and Ad. 313, it is said by *Parke*, J., that "the very appropriation of the chattel is equivalent to delivery by the vendor; and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession." From the conclusion of the contract until the

May Term, 1853.

STARR v. LAWS.

actual delivery of the colt, the seller, *Henline*, was a bailee. *Willis* v. *Willis*, 6 Dana 48.—*Crawford* v. *Smith*, 7 *id.* 59.

Per Curiam.—The judgment is affirmed with costs.

D. H. Colerick and R. L. Walpole, for the plaintiff.

J. P. Greer, for the defendant.

STARR *v.* LAWS and Another.

Usury may be given in evidence under the general issue.

A. being indebted to *B.* for the balance of a note then due, and desiring an extension of credit, went with *B.* to *C.*, to whom *B.* then sold the note at a discount of 10 per cent., upon an agreement that a credit of a year was to be extended to *A.* upon the note. *A.*, at the same time, to indemnify *B.*, executed to *B.* a note, in form of a due bill, for the amount of the discount upon the first note. *Held*, that the latter note was void, as being given entirely upon a usurious consideration.

Thursday, June 2.

ERROR to the *Union* Circuit Court.

STUART, J.—Debt by *Starr* against *Laws* and another, on a note for 73 dollars. Plea, the general issue. Trial by the Court, and finding and judgment for the defendant.

It seems that *Starr* held a note of 1000 dollars against *Laws*, on which there were 730 dollars still unpaid and on interest. Being unable to pay the note at maturity, *Laws* went with *Starr* to one *Snyder*, to whom the note was sold at a "shave," as the parties called it, of 10 per cent. By this arrangement *Snyder* was to have an extension of the time of payment one year, and stand the "shave" to which *Starr* had submitted in the sale of the note. To make up the 10 per cent. to *Starr*, the note now in suit was given, and being in form a due bill, it drew interest from date.

It is settled that usury may be given in evidence under

the general issue. *Cohee* v. *Cooper*, 8 Blackf. 115. The only question raised is, whether this note is usurious. On that point there seems no room for doubt. The whole consideration of the one note was usurious interest reserved for forbearance on the other. The note for 730 dollars was drawing 6 per cent. interest; the note now sued on was composed entirely of the additional 10 per cent. for the forbearance of one year on the large note. Besides, the note in suit was itself bearing interest from date. The interest thus reserved, directly and indirectly, for the forbearance on the large note, was over 16 per cent. The taint of usury going to the entire contract, so far as the note in suit is concerned, it cannot be enforced.

Per Curiam.—The judgment is affirmed, with costs.

S. W. Parker, for the plaintiff.

J. S. Reid and *J. Yaryan*, for the defendants.

The State v. Wingate.

Motion to quash an indictment. The clerk recited in the record the impanneling of the grand jury, their names, and that one of them was afterwards discharged and another sworn and sent to the grand-jury room in his stead. *Held*, that even admitting that the matter recited by the clerk was properly before the Supreme Court as a part of the record, the motion should have been overruled.

ERROR to the *Clay* Circuit Court.

Thursday, June 2.

Stuart, J.—Indictment for an assault and battery. Motion to quash sustained.

The clerk recites, among other things, the impanneling of the grand jury, their names, and that one of them was afterwards discharged and another sworn and sent to the grand-jury room in his stead.

If we admit that the matter recited by the clerk is pro-

May Term, 1853.

LAWRENCE v. LANNING.

perly before us as a part of the record, we should still presume in favor of the regularity of the proceedings of the Court below, in relation to the grand jury. Thus, it is fair to presume that the Court discharged the juror on account of sickness or some other adequate cause. The record shows there were still fourteen grand jurors; and does not show that the juror sworn in the place of the one discharged, acted with the grand jury in finding this bill.

The indictment itself is on its face good.

The motion to quash should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Gooding, for the state.

LAWRENCE *v.* LANNING.

Where the statement of a witness is relevant to the issue, evidence of a contradictory statement made by him out of Court, is admissible, to impeach his testimony.

In an action for the malicious prosecution of a criminal charge against the plaintiff, malice can not be inferred from the fact that the defendant employed counsel to prosecute the charge.

The mere belief that a person has been guilty of a crime, is not sufficient to authorize a criminal prosecution against him. There must be reasonable and probable cause for the prosecution.

Thursday, June 2.

ERROR to the *Franklin* Circuit Court.

DAVISON, J.—This was an action on the case by *Lanning* against *Lawrence* for malicious prosecution. Plea, not guilty. Verdict and judgment for the plaintiff below.

Upon the trial it was proved that in the prosecution alleged to have been malicious, *Lawrence* had charged *Lanning* with having stolen his coat. There was evidence tending to prove that *Lawrence*, on the 2d of *September*,

1849, had lost said coat in the woods, and that *Lanning* had found it there on the same day, and taken it to the house of *Nancy Stout*, near to where it was found, that it might be discovered by the owner. *Lawrence* then produced *Caleb Jones*, a witness, who testified that on the 4th of *September*, 1849, he and his father were at *Lawrence's* saw-mill, and, while there, he saw a coat lying on a bench which he took to be the coat said to have been stolen by *Lanning;* whereupon *Lanning* asked the witness whether he did not, at a certain time and place specified, tell one *Foster* that if his, *Jones's*, father should swear that he saw the coat lying on the bench mentioned by the witness on that occasion, he would swear to a d——d lie? which question the witness answered in the negative. *Lanning*, at the proper time, called *Foster*, and asked him whether *Jones* did not, at the time and place designated, state that if his, *Jones's*, father should swear that he had seen said coat lying on said bench on the 4th of *September*, 1849, he would swear to a d——d lie? to which question *Lawrence* objected. The Court overruled the objection, and *Foster* testified that *Jones* did make such statement at the time and place designated. *Jones's* father, before this, had been called as a witness, and stated that he saw the coat at the mill on the 4th of *September*, 1849.

The plaintiff contends that the matter sworn to by *Jones* was not material to the issue, and, therefore, the testimony of *Foster*, showing his statements out of Court was improperly admitted.

The point here presented, admits of some doubt. But we are inclined to believe that the ruling of the Court was correct.

Lanning had proved that on the 2d of *September* he found the coat and left it at *Stout's*. This tended to show his innocence of the charge upon which he had been prosecuted. *Jones* testified that he had seen the coat at the mill on the 4th of *September*. If the coat was at the mill on the day stated by *Jones*, the jury might have inferred that it was not found and left at *Stout's*. Mr.

May Term, 1853.

LAWRENCE v. LANNING.

Starkie says, "the rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry." 1 Starkie's Ev. 188.

The matter sworn to by *Jones* seems to have been in conflict with the state of facts set up by *Lanning*, tending to prove his innocence of the charge of stealing the coat, and was, therefore, "immediately connected with" an important inquiry on the trial.

We think that *Jones's* testimony was relevant and not collateral to the issue; and proof that he made a statement out of Court contrary to what he had sworn on the trial, was properly admitted.

Among the several instructions given to the jury, the following are complained of by the plaintiff in error:

1. That the fact that the defendant employed counsel to prosecute the criminal cause against the plaintiff, is a fact from which the jury may infer malice.

2. That because the defendant believed the plaintiff had stolen his coat, is not sufficient to authorize him to institute a criminal charge against him.

The first instruction is evidently erroneous. We know of no principle that would authorize the jury to infer malice from the mere fact of the defendant having employed counsel to prosecute the criminal charge alleged against the plaintiff. It has been held, that the advice of counsel as to there being a good cause of action upon the real facts, will repel malice. 2 Starkie's Ev. 499, 500.—3 Mason 102. And, although it cannot be said that the employment of counsel to prosecute in such case, would repel malice, still, we think it is not a fact from which malice can be fairly inferred. The jury may have been misled by this instruction, and, on account of it, the judgment must be reversed.

The second instruction was correct. The mere belief of *Lawrence* that *Lanning* had stolen his coat was not sufficient to authorize the prosecution. There must have been reasonable and probable cause for instituting the criminal proceeding. *Stone* v. *Stevens*, 12 Conn. 219.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the plaintiff.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY *v.* LANGSDALE and Another.

ERROR to the *Marion* Circuit Court.

Thursday, June 2.

DAVISON, J.—*Langsdale* and *Hughes* sued the *Madison and Indianapolis Railroad Company* before a justice of the peace. The justice gave judgment for the plaintiffs, and the defendant appealed to the Circuit Court.

The declaration alleges, *inter alia*, that the defendants, on the 15th of *June*, 1847, were engaged in the business of a common carrier of goods between *Madison* and *Edinburgh* for hire, and the plaintiffs caused to be delivered to the defendants at their northern depot at *Edinburgh*, ten barrels of flour, the property of the plaintiffs, of the value of 75 dollars, to be carried from thence to *Madison*, at their *Madison* depot. And the defendants then and there undertook to carry the said ten barrels of flour from their depot at *Edinburgh* to their depot at *Madison*, for a reasonable reward; yet the defendants did not safely carry and deliver said ten barrels of flour with care, &c., but negligently, &c., failed to carry the same, &c., and the said ten barrels of flour were thereby lost to the plaintiffs, &c.

The cause was submitted to the Court by consent. The Court found for the plaintiffs and assessed their damages at 47 dollars and 80 cents. Motion for a new trial overruled, and judgment for the plaintiffs.

The refusal of the Court to grant a new trial is the only error assigned.

May Term, 1853.

CORWIN v. REDDINGTON.

There is no point of law raised in this case. The evidence is upon the record; and the only question to be determined is, was it sufficient to sustain the finding and judgment of the court? Upon an examination of the evidence, we are of opinion that it fully sustains the judgment; and that the motion for a new trial was properly overruled.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. L. Ketcham, for the plaintiffs.

L. Barbour, for the defendants.

CORWIN *v.* REDDINGTON and Others.

A. held land by title-bond and had paid the purchase-money, and being sued at law for a debt, in order to prevent the land from being sold for the payment of the judgment, caused it to be conveyed, without consideration, during the pendency of the suit, to *B.*, his son, who, before judgment, conveyed it to *C.* Judgment was afterward rendered against *A.* for the debt. *B.* and *C.* both received the conveyance, with a knowledge of the suit, and to prevent a sale of the land to satisfy the judgment; and *A.* still remained in possession of the land. *Held*, that the land was liable in equity for the payment of the judgment.

Thursday, June 2.

ERROR to the *Decatur* Circuit Court.

PERKINS, J.—Bill in chancery to set aside a conveyance of real estate alleged to be fraudulent, and to subject said real estate to sale, &c. Answers and replications were filed, depositions taken, the cause submitted to the Court for determination, and the bill was dismissed.

The case turns entirely upon the weight of evidence, and it appears to us to be satisfactorily established that the conveyance in question was fraudulent, and should have been set aside.

We shall not embody the evidence in this opinion, further than to say that, in 1833, a judgment was obtained in *Ohio*, for 1000 dollars, against *John Reddington*, who afterwards removed to *Decatur* county, *Indiana*, whither the judgment in *Ohio* followed him. Before its arrival, however, he had purchased a tract of land, which he paid for, taking a bond for a deed. On the arrival of said judgment from *Ohio*, and the institution of suit on it in *Decatur* county, *Indiana*, said *John Reddington* caused said land to be conveyed, without consideration, and to prevent the collection of said judgment, to his son *Philonzo*. Of the fraudulent character of this conveyance, there can be no doubt from the evidence. *Philonzo*, however, conveyed to *William Armington*, and he claims to be a *bona fide* purchaser for a valuable consideration.

We are satisfied he is not such a purchaser. He was the family physician of *John Reddington* at the time, intimately acquainted with his circumstances, and held a bill of sale on all his personal property subject to execution, but which property he suffered to remain in *Reddington's* possession. He purchased the real estate "at Court," a day or two before judgment was rendered on the judgment against *Reddington;* the father, *John*, and the son, *Philonzo Reddington*, and a lawyer being present, and said *Armington* having full knowledge of the state of the title and extent of right in the property of the father and son, and of the pending suit upon the judgment. *Armington* has never taken possession, nor did *Philonzo*. *John Reddington* has all the time continued in the enjoyment of the use of the property. *Armington's* purchase wears a fraudulent face. (1).

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to decree the conveyance in question fraudulent, and the property subject to sale for the payment of the judgment, &c.

A. Davison, for the plaintiff.

J. S. Scobey, for the defendants.

(1) DAVISON, J., having been concerned as counsel, was absent.

May Term, 1853.

PORTER and Others *v.* UTTER.

APPEAL from the *Boone* Circuit Court.

PERKINS, J.—*Utter* filed a bill in this case to set aside conveyances of real estate made by *John Porter*, as fraudulent. Answers and replications were filed, depositions taken, &c., and the Court below decreed for the plaintiff.

We affirm that decree.

John Chrisman, *Samuel Porter*, and *John Porter*, (*John* being security), in 1841, gave a note to *Utter*. In *April*, 1846, *Utter* obtained judgment on said note against said *Chrisman* and *John Porter*, (*Samuel Porter* not being found), for 690 dollars. *Chrisman* and *Samuel Porter* became insolvent. Between 1843 and the time of the rendition of said judgment in 1846, said *John Porter* conveyed away all his property to divers sons and sons-in-law; and we think the evidence shows that he did it to avoid the payment with it, of the debt in question.

Per Curiam.—The decree is affirmed with costs.

C. C. Nave, for the appellants.

H. Brown, *J. C. Hague*, *W. B. Beach* and *I. Brown*, for the appellee.

DETRO
v.
THE STATE.

Thursday, June 2.

4 200
144 395

4(b)200
156 568

DETRO *v.* THE STATE.

A motion for a continuance, based upon an affidavit of the party, is addressed to the sound discretion of the Court trying the cause; and the propriety of granting or refusing it must depend, to a great extent, on the peculiar circumstances of each case. From the very nature of the case, the Court trying a cause—witnessing all the proceedings, and being from personal observation familiar with all the attendant circumstances—has the best opportunity of forming a correct opinion upon the case presented.

May Term, 1853.

DETRO v. THE STATE.

The general principles relative to the granting of continuances are well and clearly defined, but, of necessity, there is a considerable latitude of discretion left to be exercised by the Court, and, if no general principle has been violated, the presumption will be in favor of the action of the Court.

The Circuit Court, so far as it is vested with discretionary powers, will be presumed to have exercised them properly, until the contrary is shown; and, though its decision will be subject to revision, yet it will be presumed to have been in accordance with the justice and merits of the case, unless the party complaining shows unequivocally that the Court has been guilty of an abuse of such discretionary powers, and that his rights have thereby been injuriously affected.

The defendant, indicted for larceny in the *Wells* Circuit Court, applied for a continuance upon his affidavit stating that he could prove by one *A.*, a resident of *Miami* county, *Ohio*, that at the time the property mentioned in the indictment was *alleged* to have been stolen, the defendant was in the town of *Greenville*, and in the neighborhood, in *Darke* county, *Ohio*, and further, that said *A.* could prove his entire innocence of the charge, &c. *Held*, that the affidavit was defective for confining the *alibi* to the day alleged in the indictment. *Held*, also, that the general allegation that the defendant could prove his innocence by the absent witness, was immaterial. *Held*, also, that the refusal of the continuance was not erroneous.

After verdict against the defendant, he made a motion for a new trial, on the ground of the refusal of the Court to grant the continuance upon said affidavit. The Court overruled the motion. The evidence in the cause was not set out in the record. *Held*, that it must be presumed that the evidence did not disclose that the larceny was committed on the day *alleged* in the indictment and that no cause for a new trial was made by the evidence.

Thursday, June 2.

APPEAL from the *Wells* Circuit Court.

ROACHE, J.—This was an indictment for larceny against *Detro* and one *David Brown*. Plea, not guilty. There was a trial, and verdict of guilty. Motion for a new trial overruled, and judgment on the verdict.

Detro alone appeals.

The only error assigned is, that the Court below improperly refused to continue the case upon sufficient cause shown by an affidavit.

The material allegations of the affidavit are, that the defendant could prove by one *David Jones*, a resident of *Miami* county, *Ohio*, "that at the time said property in said indictment is *alleged* to have been stolen, this defendant was in the town of *Greenville*, and in the neighbor-

May Term, 1853.

DETRO v. THE STATE.

hood, in *Darke* county, *Ohio;* and further, that by said *Jones* he can prove his entire innocence of said charge," &c.; "that the indictment was found at the present term of this Court, and this defendant has not had any opportunity of procuring testimony," &c.; "and that he would be able to procure said testimony by the next term of the Court," &c.

On the return of the verdict, the defendant moved for a new trial, assigning as a cause, among others, the refusal to grant him a continuance upon his affidavit. This being the sole error complained of here, is the only question for our consideration.

The motion for a continuance, based upon an affidavit of the party, is addressed to the sound discretion of the Court trying the cause; and the propriety of granting or refusing it must depend, to a great extent, on the peculiar circumstances of each case. From the very nature of the case, the Court trying a cause, witnessing all the proceedings, and being from personal observation familiar with all the attendant circumstances, has the best opportunity of forming a correct opinion upon the case presented. The general principles relative to the granting of continuances, are well and clearly defined; but of necessity there is a considerable latitude of discretion left to be exercised by the Court, and if no general principle has been violated, the presumption will be in favor of the action of the Court.

In so far as they are vested with discretionary powers, they will be presumed to have been properly exercised, until the contrary is shown. All their decisions are, it is true, subject to revision; but, in all such cases, the ruling of the Circuit Court will be presumed to have been in accordance with the justice and merits of the case, unless the party complaining shows unequivocally that the Court has been guilty of an abuse of its discretionary powers, and that his rights have been injuriously affected by such abuse. *Gordon* v. *Spencer*, 2 Blackf. 286.

The affidavit does not present such a case. The day alleged in the indictment is immaterial. It is sufficient

on the trial to prove the commission of the crime on another and different day.

If on the trial it had appeared in proof that the crime was committed on a day different and sufficiently distant from that alleged in the indictment, this evidence of *Jones* could have been of no service to the defendant, for it would not have tended to establish his innocence. The affidavit is clearly defective for confining the *alibi* to the day alleged in the indictment.

On the motion for a new trial, the defendant again brought up the question and insisted upon the error in refusing to grant a new trial, as a good cause. He then had again the full benefit of his motion, after the evidence in the cause had all been heard, and while it must have still been fresh in the mind of the Court. If the evidence had been that the larceny was committed on the day alleged in the indictment, and therefore at the time the defendant's affidavit alleged that he was in *Ohio*, the Court would have seen the materiality of the testimony of the absent witness, and should have granted a new trial.

But the evidence is not set out in the record, and we are therefore only left to presume, in favor of the action of the Court below, that no such cause for a new trial was made by the evidence.

The general allegation that the defendant could prove his innocence by the absent witness, is immaterial. He must state the facts he expects to be able to prove, in order to enable the Court to judge whether they tend to establish his innocence. He must not state conclusions.

The fact that the defendant was put on his trial at the same term at which the indictment was found, is a circumstance which ought to be allowed its full weight in determining the application for a continuance. But in order to show that he would be injured by being hurried into trial upon the return of the indictment, he must inform the Court by his affidavit of the existence of facts material to his defence, which he can prove by absent witnesses. In the absence of an affidavit showing that

May Term, 1853.

FORBES v. TIFFANY.

by a reasonable delay he would be able to procure testimony of facts which tend to establish his innocence, it is not to be supposed he would be prejudiced by being put on his trial at once.

Per Curiam.—The judgment is affirmed with costs.

J. R. Slack, for the appellant.

R. A. Riley, for the state.

FORBES *v.* TIFFANY and Others.

Scire facias, under the R. S. 1843, on the transcript of a justice's judgment, for an execution against real estate. The *scire facias* alleged that *A.*, *B.*, and *C.*, merchants trading under the name of *A. & Co.*, recovered a judgment under their firm name, &c. Pleas, 1. That *A.*, *B.*, and *C.* were not, at the time of the recovery of judgment, nor at any other time, partners under the name of *A. & Co.*, nor did they, as partners, or otherwise, recover the judgment, &c.—2. That *A.*, *B.*, and *C.*, were not, at the commencement of the suit, nor are they yet, the owners of the judgment as partners under the name of *A. & Co.*, or otherwise. The pleas, not having been sworn to, were, on motion, rejected. *Held*, that the rejection was right.

Where the judgment has been assigned, such *scire facias* may be prosecuted, under the R. S. 1843, in the name of the judgment-plaintiff.

The defendant cannot, in such case, complain of the omission of the clerk to indorse upon the writ that it is for the use of the assignee.

Thursday, June 2.

ERROR to the *Decatur* Circuit Court.

ROACHE, J.—*Scire facias* on the transcript of a justice's judgment for execution against real estate.

The *scire facias* alleges that *Osmond C. Tiffany*, *Elias B. Long*, and *William W. Bym*, merchants trading under the firm name of *O. C. Tiffany, & Co.*, recovered a judgment before a justice, under their firm name, against *Angus Forbes*.

The defendant in the Court below filed five pleas, upon three of which issues were formed. The other two were, on motion, rejected. The rejection of these pleas is the error complained of.

The first plea alleges that *Osmond C. Tiffany, Elias B. Long*, and *William W. Bym*, were not, at the time of the recovery of the judgment before the justice, or at any other time, partners under the name of *O. C. Tiffany, & Co.*, nor did they, as partners, or otherwise, recover the said judgment, &c.

The second plea alleges that *Osmond C. Tiffany, Elias B. Long*, and *Wiliium W. Bym*, were not, at the time of the commencement of this suit, (nor are they yet), the owners of said judgment, as partners under the name of *O. C. Tiffany, & Co.*, or otherwise.

The *scire facias* is an original suit, founded on the judgment of the justice of the peace. In the writ, which, in this proceeding is the declaration, it is alleged that *Osmond C. Tiffany, Elias B. Long*, and *William W. Bym*, partners, recovered a judgment before the justice, under their partnership name of *O. C. Tiffany, & Co.*, and that the judgment belongs to them as such partners. The pleas were not sworn to, and on that ground were rejected. They, in effect, denied that the plaintiffs, as partners, as they alleged in the *scire facias*, had recovered and were the owners of the judgment before the justice. They should have been verified by affidavit. There was no error in their rejection.

The issues joined were found for the plaintiff below, and he had judgment of execution.

The plaintiff in error contends, that inasmuch as it was shown in proof that one *Groves* was the owner of the judgment at the time of the issuing of the *scire facias*, the proceeding to enforce it should have been in his name, and not in the name of the original judgment-plaintiffs.

Section 15, art. 2, of c. 31, R. S. 1843, provides that in case of the assignment of a judgment, execution shall issue in the name of the original plaintiff.

May Term, 1853.

ELLIS v. HUBBARD.

There was no impropriety in the writ, the object of which was to establish the lien of the original judgment and enforce its execution, being in the name of the party in whose name the execution is to be issued.

It was perhaps proper, under the provisions of the statute, that the clerk should have indorsed upon the writ that it was for the use of the assignee. But his omission to do so cannot, in any way, injure the judgment-defendant. It does not affect his rights. It was an omission of which the assignee alone had a right to complain. (1)

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

A. Davison, for the plaintiff.

J. Robinson, for the defendants.

(1) DAVISON, J., having been concerned as counsel, was absent.

ELLIS *v.* HUBBARD.

Debt on three promissory notes under seal. Plea, that the consideration of the notes was the sale of a certain parcel of land, situate, &c., and that, at the time of making the notes, the plaintiff agreed to give the defendant a warranty deed for the land on the first payment, (which first payment was the note described in the declaration, payable 1st of *March*, 1847,) and to take a mortgage back as security, and that the plaintiff had not conveyed nor offered to convey the land to the defendant upon the payment of the note payable on the 1st of *March*, 1847, and the execution of a mortgage by the defendant to secure the other notes given for said purchase-money. *Held*, upon demurrer, that the plea was sufficient to bar the action.

Thursday, June 2.

ERROR to the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—Debt on three several promissory notes under seal. There were two pleas. On the first, there was issue joined, and no question arises upon it for our consideration. The second plea was as follows:

"And for a further and second plea in this behalf, the said defendant says *actio non*, because he says that the sole and only consideration of said three several writings obligatory was and is the sale of a certain piece or parcel of land, situate in the county of *Tippecanoe*, and state aforesaid, to-wit," &c., "and at the time of making said notes, said plaintiff agreed to give a warranty deed for said land to said defendant on the first payment, (which first payment is the writing obligatory described in said declaration, payable 1st of *March*, 1847,) and take a mortgage back as security; and said defendant avers that said plaintiff has not conveyed to said defendant said land, nor has he offered to convey the same upon payment of the said writing obligatory payable the 1st of *March*, 1847, and the execution of a mortgage by said defendant to secure the other writings obligatory given for said purchase-money; and this," &c.

Demurrer to this plea sustained, and final judgment for the balance due on the notes.

It is objected to the plea that it does not aver a readiness on the part of *Ellis* to pay the money and execute a mortgage on receipt of the deed.

By the terms of the agreement, as set out in the plea, the payment of the first note and the execution of a mortgage to secure the other two, on the part of the vendee, and the execution of the deed by the vendor, were dependent acts. Either party suing for a breach of the contract, in such a case, in order to entitle himself to recover, must show a performance, or a conditional offer to perform whatever was to be done on his part. If *Ellis* were suing to compel *Hubbard* to execute the conveyance, it would then be incumbent on him to aver that he had paid or tendered the money and mortgage; but standing in the position of a defendant, it was only necessary for him to show, in order to defeat the suit, that the plaintiff had failed to perform the part of the contract incumbent on him to perform, according to the terms and conditions of the agreement. This view is fully sustained by later cases. The decisions of this Court have not been entirely

May Term, 1853.

ELLIS v. HUBBARD.

uniform on this question, but in the case of *McCulloch* v. *Dawson*, 1 Ind. R. 413, where the question was elaborately discussed, and which we regard as settling whatever uncertainty may have before existed, the Court say, "The plea would have been more formal if it had in terms denied that the payees, or their successors, had offered the deed on the specified day, on being at the same time paid the money due. The allegation, however, that neither the trustees nor their successors had offered the deed, *according to the tenor and effect of the agreement*, on or before, &c., is equivalent to saying that they had not *legally* offered the deed on the day, and it is therefore sufficient in substance." The authorities there cited abundantly fortify the doctrine laid down, and sustain the Court in overruling a different decision on the same point in *Burrows* v. *Yount*, 6 Blackf. 458.

This authority is directly in point. The plea sets up a contract by which the vendor was bound to deliver, or offer to deliver, to the vendee a deed, *upon* the payment by him of the first note, and the execution of a mortgage to secure the residue of the purchase-money. His agreement was, in effect, to convey on the day the first note fell due. The averment is express, that the plaintiff had not conveyed, and had not offered to convey, *upon* payment of the first note, &c.; thus negativing the vendor's performance of the contract in the very words of the contract itself. As the averment denied, in general terms, that the plaintiff had made or tendered a deed at all, it was substantially equivalent to an averment that he had not made or tendered a deed on the day, &c. Upon the principle decided in *McCulloch* v. *Dawson*, *supra*, which we are disposed to regard as finally settling the question, the plea was sufficient to bar the action, and the demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

R. C. Gregory and *R. Jones*, for the plaintiff.

J. A. Wilstach, for the defendant.

CONWELL *v.* EMRIE.

A supervisor, for the purpose of keeping the highways of his district in order, might, under the R. S. 1843, enter upon any lands adjoining or near to any highway in his district, and thereupon construct such ditches, &c., as might be necessary for the construction, repair, &c., of such highway.

When the supervisor acts without the scope of his authority, and private injury is thereby sustained, the law will not protect him.

A person acting as supervisor was sued in case for constructing a culvert across a public road in his district in such a manner as to convey water from a hill-side into and upon the plaintiff's tan-yard, to his injury, &c. The plaintiff having proved the construction of the culvert by the defendant, in the manner charged, &c., *held*, that the defendant, in order to relieve himself from liability, was bound to show that the culvert was necessary for the construction, repair, or preservation of the highway, and was constructed at the proper place.

A judgment will not be reversed because an erroneous instruction was given to the jury, where the evidence would not have supported a verdict for the party complaining of the instruction.

ERROR to the *Dearborn* Circuit Court.

Monday, June 6.

DAVISON, J.—Trespass on the case by *Conwell* against *Emrie*. Plea, not guilty. The cause was submitted to a jury. Verdict for the defendant. Motion for a new trial overruled, and judgment on the verdict.

The following are the facts proved on the trial:

The plaintiff, in *June*, 1846, was, and still is, the owner in fee of a certain close or tract of land in *Dearborn* county, situate at the foot of, and on the north side of a certain public road, on which close he had a tan-yard. The defendant, as supervisor of the road district, &c., constructed a culvert across the road in such a manner as to convey the water from the hill-side into and upon the tan-yard, whereby the same was seriously injured. The road was so situated that a culvert across the same was, at that time, necessary; but it might have been made a few yards further east, so as to answer the purpose for which the one in question was constructed, without serious injury to any one; but it would have cost from 15 to 50 dollars more than the one constructed. At the time the culvert was built, the farm, on the tract of land, was in

May Term, 1853.

CONWELL v. EMERY.

the possession of one *Groves*, as tenant under the plaintiff; but the tan-yard was then in the possession and use of the plaintiff. *Groves* was authorized by the plaintiff to see that his property in that neighborhood was not injured; and at the time the culvert was built, he remonstrated against its construction; and immediately thereafter, the defendant offered to cut or dig a ditch from the mouth of the culvert through the lands of the plaintiff, so as to convey the drainage of the hill-side passing through the culvert between the tan-yard and the dwelling-house, on the same land occupied by *Groves;* but *Groves* would not allow the same to be done. The ordinary taxes for keeping the roads in repair, were for that year inadequate for the purpose. The defendant, before he built the culvert, took the advice of divers hands working on the road with him, with respect to the place where it should be constructed, and they, in good faith, advised its construction at the place where it was made.

The Court gave various instructions to the jury, and among them the following: "That if the defendant offered to dig a ditch by which the water, &c., would have been conveyed off said tan-yard lot, and the damage which the plaintiff has sustained would have been thereby averted, and the plaintiff or his agent forbade the defendant to do so, he cannot recover for the damage which would not have accrued, if said ditch had been made."

The giving of this instruction, and the refusal to grant a new trial, are the errors assigned.

The duty of a supervisor is prescribed by statute. He is required to keep in order the highways in his district; and for that purpose he may enter upon any lands adjoining or near to any highway in his district, and thereupon construct such ditches, &c., as may be necessary for the construction, repair, &c., of such highway. R. S. 1843, c. 16, s. 86, 87.

The power here given to a supervisor should be executed in good faith, and in a proper discharge of his duty to the public. When he acts without the scope of his

authority, and private injury is thereby sustained, the law will not protect him.

Taking this view of the case, the instruction given was not correct. The defendant could not avoid the consequences of the trespass with which he was charged, in the mode assumed by the Court. He was bound to show that the culvert was necessary for the construction, repair, or preservation of the highway, and that it was constructed at a proper place.

We think the instruction was erroneous; but still we do not consider that error sufficient cause for reversing this judgment. The record professes to contain all the evidence given on the trial. We are satisfied that it was not sufficient to have supported a verdict in favor of the plaintiff. In one respect the proof was materially defective. It was not shown that the plaintiff incurred any amount of damage from the construction of the culvert. Nor does the evidence furnish any data upon which the jury could have estimated damages in his favor. 1 Saund. Pl. and Ev. 352. The motion for a new trial was, therefore, correctly overruled.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the plaintiff.

Miley *v.* Marshall.

Bill of foreclosure. The evidence did not sustain the bill, but it was shown that the plaintiff, on several occasions before and after the execution of the mortgage, had advanced money to the defendant, the mortgagor, and for his use. *Held*, that the refusal of the Circuit Court to retain the bill and give a decree for the money thus advanced, was right.

May Term, 1853.

MILEY v. MARSHALL.

Monday, June 6.

ERROR to the *Dearborn* Circuit Court.

DAVISON, J.—Bill to foreclose a mortgage.

The bill states, in substance, that on or about the 13th of *June*, 1848, the defendant was indebted to the plaintiff in the sum of 300 dollars; and to secure the payment of that sum he executed and delivered to him a mortgage on the east half of the north-east quarter of section ten, in township seven, range one, in *Dearborn* county. There was no note or bond given as evidence of the debt. The plaintiff, after the delivery of the mortgage, handed it to the defendant to be by him given to the recorder of said county for record; but he failed to do so, and has ever since concealed it. When the mortgage was given, the defendant held the land therein described by deed from his father, one *William P. Marshall*, but soon thereafter deeded the same land back to his father. At the time the land was so deeded back, the said *William P.* had full knowledge of the existence of the mortgage. Afterwards, on the 1st of *July*, 1848, *William P.* conveyed to the defendant the east half of section ten, township seven, range one, in said county, which last deed embraces the mortgaged premises.

The bill alleges that the debt specified in the mortgage has been long since due, and is wholly unpaid; and prays that the defendant be compelled to deliver up the mortgage for the inspection of the Court; or if he cannot do so, that he state the contents thereof; that he answer without oath, &c.; and that the Court, upon final hearing, decree that the equity of redemption, &c., be foreclosed, and the premises be sold on execution, &c.

The defendant answered without oath. His answer denies the execution of the mortgage, and also all the other material allegations in the bill.

A general replication was filed to the answer.

Several depositions were taken and read upon a final hearing of the cause.

The Court dismissed the bill without prejudice.

This bill was not sustained by the evidence. It is true there was some evidence tending to prove that the de-

fendant had given to the plaintiff a mortgage on the east half of the land whereon he lived, and that the sum specified therein was about 300 dollars; but the premises alleged to have been mortgaged were not described by the evidence with sufficient certainty. Nor was the nature and extent of the estate mortgaged, whether in fee, for life, or for a less period, shown by the bill or the proofs.

The condition of the mortgage was left entirely uncertain. No proof was adduced as to when or how the sum secured was to be paid.

It was shown that the plaintiff had, on several occasions, both before and after the mortgage was given, advanced money to the defendant and for his use. And the plaintiff contends, that the Court having acquired jurisdiction of the cause, should have retained the bill and given a decree for whatever amount was proven to be due.

We are not of that opinion. The case presented by the evidence did not authorize the Court to retain the bill for that purpose. The plaintiff's remedy, if he has any, was more appropriate at law. 1 Story's Eq. s. 73.

Per Curiam.—The decree is affirmed with costs.

D. S. Major and *A. Brower*, for the plaintiff.

THE CENTREVILLE AND ABINGTON TURNPIKE COMPANY *v.* JARRETT and Others.

Under the R. S. 1843, the widow of an intestate was a tenant in common with the heirs until objection was made.

The statute creating the *Centreville and Abington Turnpike Company*, provided that, for the purpose of determining the damages to be allowed for land taken for the use of the company, each party might select one disinterested freeholder of the county, and give notice to the other party

May Term, 1853.

THE CENTREVILLE AND ABINGTON TURNPIKE COMPANY v. JARRETT.

to select another, to act as arbitrators. *Held*, that the claim filed need not show that the arbitrator selected by the claimant was a disinterested freeholder.

The statute mentioned authorized an appeal from the decision of the arbitrators selected by the parties to the Circuit Court, according to the same rules that prevail in cases taken from a justice's judgment. The company having appealed from the decision of the arbitrators to the Circuit Court, and reduced the amount awarded over 5 dollars, *held*, that the company were entitled to recover costs.

Monday, June 6.

ERROR to the *Wayne* Circuit Court.

ROACHE, J.—This was a proceeding instituted by the defendants in error to recover damages for the injury occasioned them by the location and construction of the *Centreville* and *Abington* turnpike upon their land. In accordance with the provisions of the act incorporating the company, (see local laws of 1848, p. 196, s. 13,) the claim was first filed with and passed upon by three arbitrators, selected in the mode prescribed by the parties.

From their award an appeal was taken to the Circuit Court. In the Circuit Court there was a trial by jury, verdict and judgment for the defendants in error.

The plaintiffs below, in their application for damages, claimed title, the said *Nancy* as the widow, and the other applicants as the heirs at law of *William Jarrett*, deceased. It is further alleged, that the said *William Jarrett* was seized of the premises in fee, on the 5th day of *October*, 1848, the claim having been filed on the 23d day of *June*, 1849, and that at the date of the filing the claim, he was no longer living.

In the Circuit Court, the plaintiffs in error moved to dismiss the suit, because the widow of the decedent was improperly joined in the application. They contend that under the charter of the company, the damages authorized to be assessed are for permanent injuries to the freehold, and that the widow has no estate in the lands of her deceased husband until after her dower is assigned. After her dower is assigned, her interest is several, and she must sue alone.

The language of the charter, so far as it relates to this subject, is as follows: "For the purpose of determining,"

&c., "the damage sustained by any person on whose land said road may be located," &c.

Whatever the interest of the widow under the common law may have been, it is clear that under our statute of 1843, she is a tenant in common with the heirs in the land of her deceased husband. R. S. 1843, p. 809, s. 106, 107.—4 Kent, p. 62.

Tenants in common may join in personal actions for a trespass or nuisance to their land. 1 Chitty Pl. 65. In *Merrill* v. *Berkshire*, 11 Pick. 269, which was an application to have the damages assessed for the laying out of a road over the land of tenants in common, it was held that they must join, because though their estate be several, yet the damages survive to all. And in *Gilmore* v. *Wilbur*, 12 Pick. 120, *Wilde*, J., after discussing and recognizing the principle of the case of *Merrill* v. *Berkshire*, adds, "and this principle is equally applicable to an action for the tort, and to an action of assumpsit, when the tort is waived."

The petition in this case was filed less than one year after the death of the husband. Under the statute, the widow was a tenant in common with the heirs *until* objection was made by them. By joining the heirs in the application for damages, she was, in effect, claiming to hold the estate in the lands given her by the statute. If it had been made to appear, in a proper manner, at the trial, that the tenancy in common had been determined, as by the assignment of her dower, the question would then have arisen as to whether she had been properly joined. This is a statutory proceeding, intended to give owners of lands a convenient, speedy, and cheap mode of ascertaining the amount of damages occasioned by the construction of the road. It would be unreasonable to require the same strictness in setting out the facts constituting their cause of action, as is requisite in pleading in the established common-law forms of action. It seems more proper to assimilate the proceedings to those necessary in suits before justices of the peace, where mere technical forms are disregarded.

May Term, 1853.

THE CENTREVILLE AND ABINGTON TURNPIKE COMPANY v. JARRETT.

We are, therefore, of opinion, that enough is alleged in the petition to show that the widow was correctly joined in the application for the assessment of damages.

The defendant below also moved to dismiss on the ground "that the arbitrator selected by said plaintiffs is not alleged in said claim to possess the qualifications required by the statute."

The statute provides that for the purpose of determining the damages, each party may select one disinterested freeholder of the county, and give notice to the other party to select another, to act as arbitrators. It is to be observed that the objection made is not that the arbitrator selected by the claimants was wanting in the qualifications he was required by the statute to possess, but only that the claim did not allege him to possess them. The statute only requires the claimant, upon filing his claim, to select an arbitrator possessing the qualifications indicated, and to give notice to the company, &c., to select another, but does not provide that the claim should show the fact of his qualifications.

The motion to dismiss was correctly overruled by the Court.

On the return of the verdict, the defendants below moved the Court to order the costs to be taxed against the plaintiffs, which motion was overruled. The provision of the act, s. 13, bearing on this subject, is as follows: "And the decision of such arbitrators in the premises shall be final and conclusive, unless appealed from to the Circuit Court, which appeal is hereby authorized according to the same rules that prevail in cases taken from a justice's judgment." One of the "rules" that prevail in appeals from a justice's judgment is, that if the defendant against whom judgment is rendered, appeal, and the amount recovered before the justice be reduced 5 dollars or more, costs shall be awarded him. Although the rule may be a hard and oppressive one, the language of the act is too clear to admit of any doubt but that by the general terms used, it embraces all the regulations applicable to cases appealed from magistrates. In this case the amount ad-

judged by the arbitrators was 100 dollars; the company, who were the defendants there, appealed to the Circuit Court; in that Court the amount was reduced to 60 dollars. The costs should, therefore, have been taxed to the plaintiffs below.

May Term, 1853.

POLLYS v. SWOPE.

Per Curiam.—That part of the judgment taxing the costs against the defendants below, is reversed. The residue is affirmed.

J. S. Newman, for the plaintiffs.

J. Perry, for the defendants.

POLLEYS and Another *v.* SWOPE.

A party by amending his plea after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer.

Where there are issues under which evidence to sustain the finding of the Circuit Court would have been admissible, it will be presumed, in the absence of a bill of exceptions embodying the testimony, that the Court had before it the evidence necessary to sustain its finding and judgment.

ERROR to the *Decatur* Circuit Court.

Monday, June 6.

ROACHE, J.—This was a proceeding by *Swope*, as sheriff of *Decatur* county, by notice and motion, to obtain a judgment against *Polleys & Butler*, who were the defendants below, for the amount of a bid alleged to have been made by them at a sheriff's sale, with 10 per cent. damages, under the provisions of s. 429, c. 40, R. S. 1843.

Polleys & Butler appeared and filed several pleas, to several of which demurrers were sustained. The plaintiffs here contend that sustaining the demurrers to their pleas was erroneous. The record shows that the defendants filed amended pleas after the demurrers were sustained, in every instance, and issues were accordingly

May Term, 1853.

BURNETT v. COFFIN.

made up. No question arises on the pleadings for our consideration, the plaintiffs having waived their right to complain, by amending.

The Court, to whom the issues joined were submitted for trial, found for the defendants below, and accordingly set aside the sale and rendered judgment in their favor.

It is also alleged that the finding and judgment of the Court were erroneous. Upon what grounds the defendants below, who succeeded in maintaining their defence and obtaining a judgment, now ask to have that judgment reversed, we are not informed, except by the assignment of errors indorsed on the record; and we do not perceive any.

The evidence is not set out in the transcript.

There were issues joined under which evidence would have been admissible which would sustain the finding. In the absence of a bill of exceptions embodying the testimony, we must presume that the Court had before them all the evidence necessary to sustain their finding and judgment.

Per Curiam.—The judgment is affirmed with costs.

J. Robinson, for the plaintiffs.

J. S. Scobey, for the defendant.

---

4 218
133 160

BURNETT *v.* COFFIN.

In actions *ex delicto*, under the R. S. 1843, where the title to real estate comes in question, the plaintiff, when successful, is entitled to recover full costs, though he does not recover 5 dollars in damages.

Action to recover damages for the overflow of the plaintiff's land by a mill-dam erected by the defendant. Plea, not guilty. Verdict for the plaintiff for 1 cent, and judgment accordingly, and for costs. The R. S. 1843 were then in force. The evidence was not upon the record. *Held*, that it must be presumed that the title to real estate came in question, and that the judgment for costs was, therefore, right.

May Term, 1853.

CARLISLE v. GASKILL.

Monday, June 6.

APPEAL from the *Hendricks* Circuit Court.

PERKINS, J.—This was an action by *Coffin* against *Burnett* to recover from the latter the amount of damages alleged to have been done to the lands of the former by an overflow occasioned by a mill-dam erected by the latter. There was a jury trial of the issue raised by the plea of not guilty, and a verdict for the plaintiff for 1 cent in damages, and judgment for that amount, with full costs.

The defendant below brings the case to this Court and assigns for error the giving of full costs to the plaintiff.

In actions *ex delicto*, under the code of 1843, where the title to real estate comes in question, the plaintiff recovers full costs, when successful, even though he do not recover 5 dollars in damages. R. S. 1843, p. 735, (1). The title to real estate may have come in question under the general issue in this case, and, the evidence not being upon the record, we must presume that it did, and that the action of the Court below upon the subject of costs was right. *Stewart* v. *Henry*, 5 Blackf. 445.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave, for the appellant.

J. S. Harvey, for the appellee.

(1) The R. S. 1852 contain a similar provision. Sec. 398, of vol. 2, p. 127, enacts that, "In all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question."

CARLISLE and Another *v.* GASKILL and Others.

A conveyance of land to a husband in satisfaction of a demand for damages against the grantor for the seduction of his wife, is valid as against the creditors of the grantor, where there appears to have been no fraud on the part of the husband.

May Term, 1853.

CARLISLE v. GASKILL.

Monday, June 6.

ERROR to the *Morgan* Circuit Court.

PERKINS, J.—Bill to set aside a conveyance of real estate.

The bill was dismissed below, at the final hearing, on the merits.

It charges that *George Gaskill*, one of the defendants in the bill, was indebted, in 1838, to *Carlisle* and *White*, the plaintiffs, in the sum of about 800 dollars, and that judgment was obtained for said amount in 1849; that during the pendency of the suit in which said judgment was obtained, said *Gaskill*, to defraud his creditors, and through duress, and without consideration, conveyed all his property subject to execution, to *Harmon Updegraff*, who is also a defendant to the bill. The bill seeks to set aside said conveyance.

Updegraff answers, and admits that *Gaskill* conveyed to him the property described in the bill, worth some 500 dollars, but says he received the conveyance of it in good faith, without any knowledge of the claim of the plaintiffs, and for the following consideration, viz.: *Gaskill* had seduced and had criminal connection with the wife of him, said *Updegraff*, for which he, *Updegraff*, had a claim for damages that he was determined to have satisfied; and in compromise and satisfaction of said claim, he asserts, said conveyance was made, a release of the claim being executed on receiving the conveyance.

The evidence in the case, we think, abundantly sustains the answer; and such being the case, the bill was rightly dismissed.

The consideration upon which the conveyance was made was a valid one, and there being no fraud, at least on the part of the grantee, it will stand even against creditors. See *Doe* v. *Horn*, 1 Ind. R. 363.

Per Curiam.—The decree is affirmed with costs.

W. J. Peaslee and *L. Barbour*, for the plaintiffs.

C. Wright, for the defendants.

COOK *v.* NOBLE.

In a suit upon a promissory note, where the defence is a failure of the consideration, and the evidence at the trial is about equally balanced, the plaintiff must recover the amount of the note—the burden of impeaching the consideration being upon the defendant.

The Court, sitting as a jury, having found a verdict for the defendant upon such evidence, the Supreme Court set aside the verdict and remanded the cause for a new trial.

ERROR to the *Johnson* Circuit Court.

Monday, June 6.

STUART, J.—Assumpsit by the payee against the maker of two promissory notes of 75 dollars each. Trial by the Court, and finding for the defendant. Motion for a new trial overruled, and judgment according to the finding. The evidence is all embodied in the record.

The only plea filed was the general issue, with an agreement opening the whole field of evidence to both parties. *Noble's* defence to the notes was a failure of consideration. It appears that about the date of the notes, *Noble* purchased of *Cook* an animal of the *Durham* breed for stock. When the purchase was first spoken of, *Cook* asked 200 dollars, and offered to warrant the animal sound and suitable to breed from. This was some time prior to the date of the notes; and it does not appear that when the sale was made, there was any warranty given. The sale for 50 dollars less would scarcely authorize us to presume that the offer to warrant was continued.

The evidence for the defence tended to show that the animal was unsound and incompetent a few days after the sale. The evidence on the other side tended to show that he was sound and competent a few days before. The weight of the evidence on both sides is pretty equally balanced. Of course the plaintiff must recover. For the burden of impeaching the consideration of the notes lay upon the defendant. In the absence of a warranty, the evidence for the defence, rebutted as it is, is wholly insufficient. Even with a warranty, and the evidence so nearly balanced, the defence could not be main-

May Term, 1853.

PERKINS v. THE STATE.

tained, for there would still be the notes to throw the preponderance in favor of the plaintiff. Impeaching evidence, successfully rebutted, leaves the notes precisely as they were.

Something is said in argument about the manner of the plaintiff's witnesses. It does not appear that any of the witnesses contradicted themselves, or were otherwise impeached. And the manner of a witness, if it could be put on the record, springing as it generally does from his habits, experience, and associations, would, unsupported by other facts, be a vague and unsafe criterion of his veracity.

The evidence does not authorize the finding.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. J. Peaslee, for the plaintiff.

H. Brown and *A. G. Porter*, for the defendant.

---

4 222
147 372

PERKINS *v.* THE STATE.

Indictment for receiving and concealing stolen goods. Upon the trial the state introduced one *A.* as a witness, who testified that one *B.*, *C.*, and himself stole the goods, and that the defendant, knowing them to be stolen, received them into his possession and assisted in concealing them. The defendant, thereupon, proved by other witnesses that *A.* had stated out of Court that he had made the charge against the defendant with the hope of a pardon, and that the defendant had nothing to do with the matter. The state, then, to sustain *A.*'s evidence, offered a witness to prove that *A.* had testified before the grand jury that found the indictment, to the same that he had sworn at the trial; and the Court, notwithstanding the defendant's objection, admitted the evidence. *Held*, that the evidence was properly admitted.

Monday, June 6.

APPEAL from the *Dearborn* Circuit Court.

DAVISON, J.—This was an indictment for receiving and concealing stolen goods. Plea, not guilty. Verdict and judgment for the state.

Upon the trial, the state introduced one *Hite*, who testified that one *Brown*, one *Spencer*, and himself, had stolen the goods specified in the indictment; and that the defendant, knowing the goods to have been stolen, received them into his possession and assisted in concealing them. Whereupon the defendant proved by other witnesses that said *Hite* had stated out of Court that he had made the charge against the defendant with the hope of a pardon, and that the defendant had nothing to do with the matter. Thereupon the state, for the purpose of sustaining *Hite's* evidence, offered a witness to prove that *Hite*, before the grand jury that found this indictment, had sworn the same that he did on the trial in Court. The defendant objected, but the Court overruled the objection and permitted the witness to inform the jury what *Hite* had sworn before the grand jury; which, in substance, was the same as the evidence given by him on the trial in Court.

The admission of evidence to show what *Hite* swore to before the grand jury, is the only error assigned. Was this testimony correctly admitted?

In *Beauchamp* v. *The State*, 6 Blackf. 299, it was held that "if a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be supported by proving other statements made by him in accordance with it." See, also, *Coffin* v. *Anderson*, 4 Blackf. 395.—*Jackson* v. *Etz*, 5 Cowen 314.

The plaintiff admits the force of these authorities; but he contends that a distinction exists between the cases just cited and the one before us. He alleges that "there may be some propriety in receiving evidence of statements made out of Court," &c., "for it tends to show that the witness that testifies to the conflicting statements may have been mistaken; but nothing of that sort can be implied from this double swearing." We cannot see the point of distinction sought to be made. What the witness, *Hite*, had sworn before the grand jury was, in effect, a statement out of Court. It was consistent with his testimony upon the trial, admitted to repel the force of the evidence given to impeach his character for veracity; and

May 1853.

IRELAND v. CHAUNCEY.

being made under oath, it could not, on that account, be less effective or more liable to objection.

It seems to us that the case presented by the record is, obviously, within the rule laid down in *Beauchamp* v. *The State*, *supra*. The validity of this rule has been denied. Mr. *Greenleaf* says, "Evidence that he, the witness, has, on other occasions, made statements similar to what he has testified, is not admissible" (1). But, in our opinion, the weight of authority is decidedly in favor of admitting the evidence. *Coffin* v. *Anderson*, *supra*, and cases there cited.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the appellant.

B. J. Spooner, *N. B. Taylor*, and *J. Coburn*, for the state.

(1) 1 Greenl. Ev., s. 469.

IRELAND v. CHAUNCEY and Others.

Assumpsit by executors on three promissory notes. *Plea*, that the notes described in the declaration, and another, of the same date, for 75 dollars, were all given to the testator in his lifetime, in consideration of the sale by the testator to the defendant of a certain tract of land, described therein, and for no other consideration whatever; that, at the time of the execution of the notes, the testator agreed to convey the land to the defendant on the payment of said several notes. Averment, that before the commencement of the suit the defendant had paid the 75 dollar note and 74 dollars on the first note described in the declaration, and that all the notes were due before the commencement of the suit; and that neither the testator in his lifetime, nor the plaintiffs, since his death, at any time before the commencement of the suit, had conveyed or offered to convey to the defendant the said land, upon the payment of the said notes. *Held*, that the plea was a bar to the action.

May Term, 1853.

IRELAND v. CHAUNCEY.

Monday, June 6.

APPEAL from the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—Assumpsit by the plaintiffs below, surviving executors of the last will of *Elisha Chauncey*, deceased, against the appellant, on three promissory notes, all bearing the same date, but payable at different times, the one last due being payable on the 25th day of *December*, 1848.

The defendant filed but one plea, in which he alleged that the three promissory notes described in the declaration, and another of the same date for 75 dollars, were all given to the testator in his lifetime, in consideration of the sale by the said testator to the defendant of a certain tract of land therein described, and for no other consideration whatever; that at the time of the execution of said promissory notes, the said testator agreed to convey the land to the defendant on the payment of said several notes. Averment, that before the commencement of this suit, the defendant had paid the 75 dollar note, and 74 dollars on the first note described in the declaration, and that all the notes were due before the commencement of this suit; and that neither the said testator in his lifetime, nor the plaintiffs since his death, at any time before the commencement of this suit, had conveyed or offered to convey to the defendant the said land, upon the payment of the said promissory notes.

To this plea a demurrer was sustained, and a judgment was rendered in favor of the plaintiffs on the notes.

The contract alleged in the plea is, in its legal effect, an agreement on the part of the plaintiffs' testator to convey the land to *Ireland* on the day the last of said notes fell due, to-wit, on the 25th day of *December*, 1848, provided that *Ireland* paid the note on receiving the deed. The averment being general, that the deed had not been delivered nor offered upon the condition of payment of the notes, at any time prior to the commencement of the suit, covers the day on which the deed should have been executed or tendered, and is equivalent to an averment that it was not tendered on the day.

It is substantially identical with the plea in the case of

May Term, 1853.

McCARTY v. PRUETT.

Ellis v. *Hubbard*, decided at this term (1), and was a good bar to the action.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory and *R. Jones*, for the appellant.

J. A. Wilstach, for the appellees.

(1) *Ante*, p. 206.

---

4 226
147 583

McCARTY and Others *v.* PRUETT.

A. sold and conveyed to *B.* and *C.* a tract of land and took their note for part of the purchase-money. Afterwards, and before the note became due, he sent an agent to collect it. Upon the proposal of *B.*, the agent agreed to take the individual note of *B.*, with an extension of the time of payment, for a part of his half of the note, upon his paying in hand the residue of such half. The money was thus paid and the note taken, and the agent thereupon entered a credit on the original note for one-half thereof. The land afterwards passed into the hands of *D.*, an innocent purchaser, for a valuable consideration, without notice of the circumstances under which the credit was made, or the individual note of *B.* executed. *A.* received the note of *B.*, acquiesced for several years in the arrangement made by his agent, and did not disapprove thereof; but afterwards filed his bill to enforce his lien, as a vendor, against the land in the hands of *D.*, for the non-payment of the individual note of *B.* *Held*, that as to *D.*, at least, *A.* must be held to have ratified the act of his agent, and that the credit entered on the original note by the agent must be treated as a payment, and that the individual note of *B.* must be regarded simply as given for money loaned.

A vendor's lien for unpaid purchase-money follows the land in the hands of a purchaser from his vendee with notice that part of the purchase-money is unpaid; but the burden of proof is on the vendor.

Monday, June 6.

APPEAL from the *Franklin* Circuit Court.

ROACHE, J.—*Pruett* filed a bill in chancery to enforce his lien upon land sold by him, for the balance of the purchase-money. The material allegations of the bill are as follows:

That on the 16th of *August*, 1839, *Pruett* sold and con-

veyed the land to one *Barwick* and *W. M. McCarty* for 2,000 dollars, of which sum they paid a portion, and gave their joint note for the residue, 1,150 dollars, due *October* 1, 1842. That on the 29th day of *June*, 1840, *Barwick* and *McCarty* sold the land to one *Samuel White*, and took his notes for the whole amount of the purchase-money, secured by a mortgage. *White* never paid any of the purchase-money, and afterwards absconded to parts unknown. Shortly after the sale to *Barwick* and *McCarty*, *Pruett* removed to *Missouri*, where he has resided ever since. In the summer of 1841, he sent one *Willis Moor* from *Missouri* to collect the note of 1,150 dollars, as his agent. *Barwick* proposed to *Moor* that if he would accept the individual note of said *Barwick* for 200 dollars, and extend the time of payment on it to *March* 1, 1843, he would pay the balance of his half of the note in cash, which *Moor*, "as such agent, agreed to do." Upon this agreement, *Barwick* executed a promissory note dated *August* 31, 1841, for 200 dollars, payable to the said *Willis Moor*, *March* 1, 1843, and paid the residue of his half of the 1,150 dollar note in cash. *Moor*, in consideration of the cash and the 200 dollar note, entered a credit on the original note, for the one-half thereof. Immediately on *Moor's* return to the state of *Missouri*, he delivered the 200 dollar note to *Pruett*, as its rightful owner. At the *February* term, 1843, of the *Franklin* Circuit Court, he recovered a judgment against *Barwick* and *McCarty* for 528 dollars and 50 cents, being the balance due on the 1,150 dollar note, after deducting the credits indorsed thereon.

That on the ——— day of ———, 1843, said *W. M. McCarty* transferred and assigned to one *Enoch McCarty* his interest in the *White* notes and mortgage, and attempted to convey the land with intent to defraud *Pruett*.

That *Barwick* becoming insolvent, on the 30th day of *June*, 1842, attempted to convey his interest in the premises to *George Holland* and *John M. Johnson*. *Johnson* conveyed his interest by quit-claim deed to *Holland*, and *Holland* to the said *Enoch McCarty*, who claims to be the owner and holds possession by virtue of said several con-

May Term, 1853.

McCarty v. Pruett.

veyances, and had received rents of the value of 1,000 dollars.

The bill further alleges that *Barwick*, *W. M. McCarty*, *White*, *Johnson*, and *Holland*, all had full knowledge of the existence and nature of his equitable lien, and charges them with full notice prior to the dates of their respective purchases.

The prayer of the bill is, that the 200 dollar note may be declared to be a lien upon the land, on the ground that it was an unpaid balance of the purchase-money. *White*, *Barwick*, *W. M. McCarty*, and *E. McCarty*, are made defendants. *White* and *Barwick* made default. The *McCartys* filed separate answers under oath.

W. M. McCarty denies that he knew of the existence of the lien at the time he sold to his father, *E. McCarty*. He alleges that he had heard that *Barwick* had paid his half of the note—he did not inquire nor know how, or in what way, but found it credited on the note—and in making the sale to his father, arranged with him to pay the other half, being his part of the note, which he has since done. He denies that he ever knew what was the consideration of the 200 dollar note, or the amount, until it was filed in this suit. He alleges that *Barwick* was solvent at the maturity of the 1,150 dollar note, but had become insolvent before the maturity of the 200 dollar note, and insists that the extension of time releases him from all liability.

W. M. McCarty also filed a cross bill, making *Pruett* and *Holland* defendants, setting up that *Pruett*, by taking the 200 dollar note and crediting that sum upon the note for 1,150 dollars, had waived his lien, and that *White*, *Holland*, *Johnson* and *E. McCarty* were *bona fide* purchasers, without notice of *Pruett's* equity. *Pruett* answered the cross bill, denying that he had intended to or did abandon his lien on the land, admitting that *Moor* acted as his agent in the transaction, but denying that he had authority to waive his lien.

Holland answered under oath, denying notice, both at the time of his purchase and of his sale to *E. McCarty*,

and asserts that the whole transaction, so far as he was concerned, was *bona fide*.

These are all the pleadings having any bearing on the questions raised in the case.

Depositions were taken and the cause went to a hearing, which resulted in a decree for the amount due on the 200 dollar note, and declaring it a lien upon the land, and in case of default in the payment of the decree, ordering a sale, &c.

The appellants insist that this decree is erroneous, on two grounds:

1. Because *Pruett*, through his agent, *Moor*, waived his lien by taking the note of *Barwick* for 200 dollars, and extending the time of payment, and entering a credit of that amount on the original note.

2. Because it is not shown that either *Holland*, *Johnson*, or *E. McCarty* had notice of the existence of the lien at the dates of their respective purchases.

The first question to be settled is, whether *Pruett* is bound by the acts of his agent, *Moor*, in the arrangement made with *Barwick*, which resulted in entering the credit on the original note; or, in other words, whether the former is responsible for the legal consequences attaching to the acts of his agent.

The facts, as established by the bill and depositions, are these: *Pruett* employed *Moor* as his agent, and sent him to *Indiana* to collect the 1,150 dollar note. *Moor* called on *Barwick* in *McCarty's* absence and without his knowledge, and agreed to take the 200 dollar note in controversy, payable to himself, extending the time of payment some five months, and indorsing on the original note a credit, in general terms, for the said *Barwick's* half thereof, including the note for 200 dollars in the credit. Immediately on his return to *Missouri*, he delivered both notes to *Pruett*. There is no evidence tending to show that *Pruett* expressed any disapprobation of the arrangement from that time until about the commencement of this suit, a period of about four years. There is nothing in the whole case to show that he ever at any time, be-

May Term, 1853.

McCarty v. Pruett.

fore the bringing of the present suit, in any mode disavowed the arrangement made by *Moor*. He was fully informed of the whole transaction shortly after its completion, had possession of the notes, brought a suit on one of them, and so far as is shown, made no attempt to repudiate *Moor's* acts until after *Barwick* became insolvent. Admitting that *Moor* exceeded his authority, *Pruett* afterwards, with a full knowledge of all the facts, by his acquiescence fully sanctioned them and made them his own. They are to be treated as the acts of *Pruett* himself. He must be held responsible for all their legal consequences.

In this view of the case, it is unnecessary to decide the question insisted on by the appellants, as to whether the taking of the new note of *Barwick* was a waiver of his lien. That question is not involved. The indorsement upon the note was *prima facie* evidence of payment of that amount of the debt, and consequently a discharge, instead of a waiver, of the lien incident to it, *pro tanto*. It therefore rests upon *Pruett* to show that the legal consequences flowing from an actual payment shall not attach to his acknowledgment of a payment; and this the more especially, as the rights of third parties have now become involved. In this he has utterly failed.

The arrangement with *Barwick* was made without the privity or consent of *W. M. McCarty*, the other payor of the original note. By that arrangement, the 200 dollar note in controversy was taken, signed by *Barwick* alone, extending the time of payment some five months beyond the maturity of the original note, and crediting it upon the original note as an absolute payment. We can regard it in no other light, so far as the rights of all third parties are involved, than as an actual payment of that amount, and a loaning of the same sum to *Barwick*. The adoption of a different view of the case would be assisting *Pruett* to perpetrate a fraud upon all the parties having an interest in the land, as well as upon *W. M. McCarty*, the joint payor of the original note. The sale was made by *W. M.* to *E. McCarty* some months after

the giving of the 200 dollar note, and after the trial which resulted in the judgment for the balance due on the original note. There is no proof that on that trial *Pruett* claimed or pretended that any more of the purchase-money was due, than the balance on the 1,150 dollar note, after deducting the payments indorsed. It is fair to presume that *E. McCarty* made his contract with reference to these facts, the evidence of which was furnished by *Pruett* himself.

From the evidence of payment furnished by *Pruett* himself by his indorsement on the note, he would very rationally conclude that when he paid the judgment for the balance of the original note (which he is proved to have since done) his land was freed from the incumbrance of the vendor's lien. This was the fair legal inference from *Pruett's* acts. After a silence of four years, he cannot be permitted to deny or evade the legitimate consequences of those acts, and subject third parties who may have made contracts in the belief that the indorsement was what on its face it purported to be, a payment.

The indorsement on the original note, under all the circumstances, must therefore be treated, so far as all third parties are concerned, as an absolute payment. The 200 dollar note embraced in that credit, was not for an unpaid portion of the purchase-money, and was consequently not a lien upon the land, at least as against the defendants below.

From what has been already said, it will be perceived that we regard *E. McCarty* in the light of a *bona fide* purchaser without notice.

The lien of a vendor of real estate for the unpaid purchase-money, follows the land into the hands of a purchaser from his vendee, provided he have notice of the lien—that is to say, have notice that a portion of the purchase-money remains unpaid. But the burden of proof is on the vendor.

The answers of *Holland* and *Johnson*, who bought *Barwick's* interest, and of *E. McCarty*, who now owns the whole tract, all deny that they had any knowledge of

May Term, 1853.

TROUTNER v. PARENT.

the lien, under oath. The evidence is not sufficient to show that they had. As to *Holland*, there is no proof at all. One witness testified that he showed the note to *Johnson* before it was due, and shortly before *Barwick* went away, with the view of employing him as an attorney to collect it; but on his cross examination he says, "he did not tell him anything about the consideration of the note, when or how it was given." It was also proved by one witness, that at some time, but whether before or after his purchase does not sufficiently appear, *E. McCarty* was apprised of the existence of the 200 dollar note, but the witness could not say whether he was informed or knew for what the note was given. This was no notice of *Pruett's* equity. The proof is, that these defendants had notice of the existence of a note for 200 dollars, payable not to *Pruett*, the vendor of the land, but to one *Moor*, due not from the vendees, *Barwick* and *McCarty*, but from one of them alone. No one would be led to suspect, even from an inspection of the note, without the explanation, which is not shown to have been given, that *Pruett* had any connection with the note. It was not even sufficient to put a buyer on inquiry.

Per Curiam.—The decree is reversed with costs. Cause remanded with instructions to the Circuit Court to dismiss the bill.

G. Holland, for the appellants.

J. A. Matson, for the appellee.

TROUTNER and Others *v.* PARENT.

In actions *ex contractu*, where the defence is in its nature joint, several defendants may join in the same plea, or they may sever; and one defendant may plead in abatement, another in bar, and another may demur.

May Term, 1853.

TROUTNER v. PARENT.

Monday, June 6.

ERROR to the *Allen* Circuit Court.

DAVISON, J.—This was an action of debt by *Parent* against *Troutner*, *Colerick*, and *Dawson*, on an injunction bond. The bond is in the sum of 100 dollars, conditioned as follows: Whereas the above-named *Troutner*, at the *July* term of the *Allen* Circuit Court, filed his bill in chancery, praying an injunction against the said *Parent*, which injunction was on that day granted by the judges of said Court in open Court; now if the said *Troutner* shall well and truly pay to the said *Parent* all damages and costs which may accrue in consequence of said proceeding, provided the said injunction granted in this case shall be dissolved, then the above obligation is to be void and of none effect; otherwise to be and remain in full force, &c.

The breach assigned is, that at the *July* term of the said *Allen* Circuit Court, in the year 1845, by the judgment and decree of said Court, the said injunction was dissolved and said bill dismissed, as appears of record, &c.

Colerick and *Dawson* were defaulted. *Parent* obtained oyer of the bond and condition, and filed two pleas: 1. *Non est factum*. 2. Performance generally. A demurrer to each plea was sustained, a writ of inquiry awarded, damages assessed, and judgment rendered for the plaintiff below.

The only error assigned is the sustaining of the demurrer to the pleas.

The defendant in error contends that the pleas are defective, because they are the separate pleas of *Troutner;* that in actions founded upon a joint or joint and several contract, co-defendants cannot sever in their pleas. We think this is a mistake. The rule seems to be, that when the defence is in its nature joint, several defendants may join in the same plea, or they may sever. And one defendant may plead in abatement, another in bar, and another may demur. 1 Chitty's Pl. 596.—Archbold's Civil Pl. 239.—Gould on Pl. 422, s. 6.

The pleas are, no doubt, both good on general de-

May Term, 1853.

murrer; and in our opinion, the decision of the Court was erroneous.

THE STATE v. WILLIAMS.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. G. Walpole, for the plaintiffs.

H. Cooper, for the defendant.

THE STATE *v.* WILLIAMS.

An indictment for receiving usurious interest upon a note, did not allege the place where the note was made. *Held*, on motion to quash, that the omission was fatal.

Where any positive fact is averred in an indictment, it should be stated to have been done "*then and there*," after the county has been clearly expressed in the body of the indictment; and the allegation of time and place, "then and there," should be repeated to every material fact which is issuable and triable.

Monday, June 6.

ERROR to the *Crawford* Circuit Court.

DAVISON, J.—Indictment for usury. The indictment alleges that the grand jurors of the state, &c., impannelled, &c., to inquire for the body of the county of *Crawford*, &c., present that *John Williams*, late of said county, on the 6th of *March*, 1849, *did receive of Martin Hoskins* a note of hand executed by said *Hoskins*, whereby he promised to pay to the said *Williams* 26 dollars and 40 cents one day after date; and that on the 27th of *March*, 1851, the said *Williams* did receive of said *Hoskins*, in payment of said note and the interest due thereon, in property and work and labor, the sum of 30 dollars and 50 cents; and therein, on the day and year last aforesaid, at and in the county aforesaid, did unlawfully and usuriously take and receive of said *Hoskins*, in property and work and labor, the sum of 4 dollars and 10 cents, in payment of the in-

APPEAL from the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—Assumpsit by the plaintiffs below, surviving executors of the last will of *Elisha Chauncey*, deceased, against the appellant, on three promissory notes, all bearing the same date, but payable at different times, the one last due being payable on the 25th day of *December*, 1848.

The defendant filed but one plea, in which he alleged that the three promissory notes described in the declaration, and another of the same date for 75 dollars, were all given to the testator in his lifetime, in consideration of the sale by the said testator to the defendant of a certain tract of land therein described, and for no other consideration whatever; that at the time of the execution of said promissory notes, the said testator agreed to convey the land to the defendant on the payment of said several notes. Averment, that before the commencement of this suit, the defendant had paid the 75 dollar note, and 74 dollars on the first note described in the declaration, and that all the notes were due before the commencement of this suit; and that neither the said testator in his lifetime, nor the plaintiffs since his death, at any time before the commencement of this suit, had conveyed or offered to convey to the defendant the said land, upon the payment of the said promissory notes.

To this plea a demurrer was sustained, and a judgment was rendered in favor of the plaintiffs on the notes.

The contract alleged in the plea is, in its legal effect, an agreement on the part of the plaintiffs' testator to convey the land to *Ireland* on the day the last of said notes fell due, to-wit, on the 25th day of *December*, 1848, provided that *Ireland* paid the note on receiving the deed. The averment being general, that the deed had not been delivered nor offered upon the condition of payment of the notes, at any time prior to the commencement of the suit, covers the day on which the deed should have been executed or tendered, and is equivalent to an averment that it was not tendered on the day.

It is substantially identical with the plea in the case of

May Term, 1853.

LOVE v. BOHAN.

Court. The defendant having failed to appear in the Circuit Court, a judgment by default was rendered against him, without an inquest of damages by the jury. *Held*, that the transcript showed, *prima facie*, that the cause was properly transferred to the Circuit Court. But, *held*, that the general issue being in, by virtue of the statute, and extrinsic evidence being necessary to prove the date of the note, a jury should have been impanneled to try the cause, as if the defendant had appeared and defended the action.

The only office of a plea before a justice that the title of lands will come in question, is to remove the cause to the Circuit Court, which then proceeds with it to final judgment as though it had been commenced in that Court.

That plea tenders no issue for trial, its effect being the same whether true or false.

Monday, June 6.

ERROR to the *Delaware* Circuit Court.

PERKINS, J.—*Bohan*, assignee, &c., sued *Love* before a justice of the peace, on a promissory note reading as follows:

Two years after date, I promise to pay unto *Jacob Crowsore* 60 dollars for value received of him, and if not paid when due, then due in twelve months after, at 6 per cent. from the 22d day of *January*, 1844. *Isaiah Love*. [Seal].

The note is without date. There is one assignment on it of *March* 3, 1847, and another bearing date *June* 23d, of the same year.

The suit was commenced on the 5th of *February*, 1849, being less than two years after the date of the first assignment.

The defendant appeared before the justice, and, the transcript recites, filed his plea "as the law directs, wherein it appears that the title to real estate will come in question and be put in issue on the trial;" whereupon the cause was certified to the Circuit Court. This plea was not copied into the record.

In the Circuit Court the defendant failed to appear, and judgment by default, without an inquest of damages by jury, was rendered against him for 68 dollars and 45 cents, and costs.

To that judgment it is objected in this Court,

1. That it does not appear that the Circuit Court had jurisdiction of the cause in which it was rendered; and,

2. That it should not have been rendered, even if jurisdiction existed, without the verdict of a jury authorizing it.

Upon the first point, it is claimed to be indispensably necessary that the plea raising the question of title to real estate, should appear in the record, to show that the cause was rightly certified to the Circuit Court; but we do not think so. The statute enacts that when such a plea, verified by oath, is filed, or when it shall appear on the trial by the proof that the title to real estate will come in question, the justice shall certify the cause to the Circuit Court, and file a transcript of his proceedings, "with all the papers belonging to such cause," in the clerk's office; whereupon the Circuit Court "shall proceed therein in the same manner as if such cause had been originally commenced in such Court, without further notice or process." R. S. 1843, p. 872. The transcript in this case states that the plea specified by the statute was filed, and the cause, in consequence, certified by the justice to the Circuit Court; and as the justice was not bound to copy the papers in the cause at length into his transcript, but simply to file them with it in the clerk's office, we think it *prima facie* appears that one of the conditions precedent, performance of which required a transfer of the cause to the Circuit Court, had been performed, and that, hence, the cause was rightly in that Court.

Upon the second point, viz., the necessity of a jury, it is argued that on the failure of the defendant to appear when the cause was called for trial, it was necessary that a jury should have been impanneled to try the issue upon the plea raising the question of title to real estate, and also to assess the damages upon the cause of action.

No jury was necessary to decide upon the truth of the plea averring that the title to real estate was involved. No action was to be had upon that plea in the Circuit Court. Its only office was to remove the cause to that Court. When it had done that, it dropped out of the case, which, by the statute, the Circuit Court then pro-

May Term, 1853.

Love v. Boman.

ceeded with to its final determination, as though it had been commenced in that Court. Whether the plea were true or false was immaterial, its effect being simply, like that of an appeal, to transfer the cause to the Circuit Court for trial, without, however, the security for the final judgment furnished by an appeal-bond.

But a jury was necessary to try the cause upon the general issue. The suit having originated before a justice of the peace, the law gave the defendant the benefit of that issue. The instrument sued on was without date, and its collection could not be forced till three years from its execution had elapsed, the option being left with the maker to delay its payment for that length of time by paying interest from a certain date. The time of its execution was necessarily to be proved by evidence *dehors* the note, and constituted a fact which the Court could not determine in the absence of a jury, except by the consent of the defendant. When the defendant was called, therefore, and failed to appear, the only course left to the plaintiff was to have a jury impanneled to try the general issue, in the same manner as if the defendant had appeared and defended the action. *Harris* v. *The Muskingum Manufacturing Company*, 4 Blackf. 267.—*Phipps* v. *Addison*, 7 *id.* 375.

The judgment must be reversed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

May Term, 1853.

McLane and Others *v.* Elmer.

McLane v. Elmer.

4 239
153 227

Indiana.
4 239
160 364

A promissory note was made payable, in terms, without the benefit of the stay of execution. Suit was brought upon the note and the Court rendered judgment for the plaintiff, and that the defendant should have no stay of execution. *Held*, that so much of the judgment as prohibited the stay of execution was erroneous.

Courts of law, as a general rule, do not enforce the specific performance of agreements unless specially authorized to do so by statute; but award damages for the breach of them.

ERROR to the *Wayne* Circuit Court.

Monday, June 6.

Perkins, J.—*Charles N. Elmer* brought an action of assumpsit upon a promissory note and assignment, of which the following are copies:

"*Centreville*, 23d *January*, 1847. $300. Twelve months after date, we or either of us promise to pay *Roswell Elmer*, or order, 300 dollars, with interest from date, value received, without the benefit of the stay of execution, or appraisement or valuation laws. *Lewis McLane*, *Alexander Cheesman*, *William McLane*."

"I assign the within note to *C. N. Elmer*. *Roswell Elmer*."

The defendants, the makers of the note, pleaded the general issue. The cause was submitted to the Court, and judgment rendered that the plaintiff recover, &c., and that the defendants have no stay of execution, &c.

That part of the judgment prohibiting the stay of exetion, must be reversed with costs, and the residue of the judgment must be affirmed. *Duerson* v. *Bellows*, 1 Blackf. 217.—*Develin* v. *Wood*, 2 Ind. R. 102. Courts of law, as a general rule, do not enforce the specific performance of agreements, unless specially authorized to do so by statute; but award damages for the breach of agreements.

Per Curiam.—That part of the judgment prohibiting the stay of execution is reversed with costs. The residue is affirmed.

J. B. Julian, for the plaintiffs.

O. P. Morton and *C. H. Test*, for the defendant.

May Term, 1853.

DIVINE v. THE STATE.

DIVINE *v.* THE STATE.

An indictment for selling spirituous liquor by retail, without license, which omits to state a price for which the liquor was sold, is bad on motion to quash.

Monday, June 6.

ERROR to the *Jefferson* Circuit Court.

STUART, J.—Indictment for vending spirits without license. Motion to quash overruled. Trial and judgment for the state.

No authorities are cited on either side. We are therefore ignorant of the ground assumed on the motion to quash in the Court below.

The objection we find to the indictment is, that there is no allegation of the price for which the liquor was sold. On motion to quash, this defect is fatal. Every fact essential to be proved, should be alleged. Here the pleader alleges a "sale," which is a conclusion from the facts, and leaves the important element of price, a fact essential to support the idea of sale, to be inferred. Perhaps, had all the facts been stated, the Court might have considered it a barter. It is inverting the order of pleading to allege conclusions, and leave the facts to inference.

The motion to quash should have been sustained.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. R. Troxell, for the plaintiff.

D. S. Gooding, for the state.

HARE *v.* THE STATE.

May Term, 1853.

HARE v. THE STATE.

4 241
127 411

4 241
136 224

After verdict against a defendant indicted for retailing spirituous liquor without license, a motion for a new trial will not be granted because the price for which the liquor was sold was omitted in the indictment.

It is not clear that a motion in arrest of judgment would be sustained for that omission.

The motion for a new trial does not go to the indictment.

In the absence of any other specified cause, it is directed to the sufficiency of the evidence.

ERROR to the *Jefferson* Circuit Court.

Monday, June 6.

STUART, J.—Indictment for retailing. Trial by the Court; finding of guilty; motion for a new trial overruled; and judgment for the state. The evidence is embodied in a bill of exceptions.

Here, as in *Divine* v. *The State*, *ante*, p. 240, no price is alleged. A motion to quash, made in time, must have prevailed. If, however, a defendant, either from negligence or policy, seek first the chances of a verdict, he ought not, afterwards, especially on motion for a new trial, to be permitted to fall back on the defects of the indictment. And this the more, since he has taken pains to set out all the evidence, and thus show that the defect of allegation was supplied.

It is not very clear that a motion in arrest of judgment would avail him. In *The State* v. *Murphy*, on a charge of felony, this doctrine is incidentally recognized. The motion made was in arrest of judgment—the appropriate one to test the sufficiency of the pleadings. Yet the Court held that the defect objected to was not sufficient to arrest the judgment, though it might have been a good cause for a motion made, in proper time, to quash the indictment. 8 Blackf. 498.

The motion for a new trial does not go to the indictment. In the absence of any other specified cause, it is directed to the sufficiency of the evidence. That is the only question raised by the motion in this case; and we are of opinion that it was correctly overruled in the Court

May Term, 1853.

CARLISLE v. RAMSEY.

below. It appears from the evidence that there was 5 cents paid for the liquor. After trial and verdict, and especially on a motion going to the evidence only, we think the judgment should stand.

Per Curiam.—The judgment is affirmed with costs.

J. W. Chapman, for the plaintiff.

D. S. Gooding, for the state.

CARLISLE and Another *v.* RAMSEY.

Bill to enjoin the sale of land on execution on the ground that the judgment-debtor, before the rendition of the judgment, had conveyed the land to the complainant, whose deed had never been recorded and had been casually lost. There was no affidavit of the loss of the deed. *Held*, that a decree for the complainant was, therefore, erroneous.

Monday, June 6.

ERROR to the *Hancock* Circuit Court.

DAVISON, J.—Bill in chancery by the defendant in error against the plaintiffs in error.

The bill alleges that *Barnet Ramsey*, on the 20th of *April*, 1840, purchased of *Rawley J.* and *James C. Ramsey*, four lots in *Charlottesville*, *Hancock* county, and received from them for said lots a deed in fee; that he delivered said deed to one *Samuel Ramsey*, to be by him given to the recorder of said county for record; but it was casually lost, and never has been recorded. The defendant, after having become satisfied that it was lost, applied to the said *Rawley J.* and *James C.*, who made him a second deed for the same lots. The second deed was executed on the 14th of *May*, 1842, and was duly recorded. Subsequently to the making of the first deed, and before the execution of the second, *Carlisle* and *Stedman* recovered in the *Hancock* Circuit Court a judgment against the said *James C. Ramsey* and one *Eli White* for 205 dollars. Afterwards, in the year 1844, an execution was

issued on said judgment, and levied on all the interest of *James C. Ramsey* in said lots.

The bill prays that the fee of said lots be vested in the defendant in error by virtue of the first deed, and for an injunction, &c.

The cause was submitted to the Court on bill, answers and depositions, and a final decree given that the legal title to said lots was and is vested in said *Barnet Ramsey*, by virtue of the first deed.

The only objection raised to this decree is, that there was no affidavit of the loss of the prior deed annexed to the bill.

This objection is well taken. The rule seems to be that "in cases of supposed lost instruments, where relief is sought," "an affidavit of the loss of the instrument, and that it is not in the power of the plaintiff, is indispensable to sustain the bill." 1 Story's Eq. Ju. s. 88. If the deed lost concern the title to lands and possession thereof is prayed to be established, such affidavit must be annexed. 1 Story's Eq. Ju., s. 83.—*Walmsley* v. *Child*, 1 Vesey 344.—*Pennington* v. *The Governor*, 1 Blackf. 78.—*Hoddy* v. *Hoard*, 2 Ind. R. 474. This case is obviously within the rule laid down in the authorities just cited; and the decree must, therefore, be reversed.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. S. Newman, for the plaintiffs.

ROGERS *v.* MAXWELL.

Indiana
4 243
170 539

A promissory note payable in property, under the R. S. 1843, imports *prima facie*, a valuable consideration.

A declaration upon such a note need not allege the consideration.

May Term, 1853.

ROGERS v. MAXWELL.

A party who has moved in arrest of judgment, cannot afterwards move for a new trial.

Where the verdict is fully sustained by the evidence, it will not be set aside because an erroneous instruction was given to the jury.

Monday, June 6.

ERROR to the *DeKalb* Circuit Court.

STUART, J.—Assumpsit on a written promise in these words:

"*November* 4, 1845. Ten days after date I promise to pay *John Maxwell* one wagon which I got from him in a trade for a piece of land. *William Rogers.*"

The suit was commenced before a justice of the peace. Judgment in that Court for *Rogers*. On appeal to the Circuit Court *Maxwell* recovered. *Rogers* prosecutes this writ of error.

In the Circuit Court the cause of action was amended so as to allege the value of the wagon to be 50 dollars.

After the amendment, a motion to dismiss for want of a sufficient cause of action, was overruled. There are two bills of exceptions, both presenting substantially the same point, viz., that the cause of action was defective because it did not allege any consideration. This was the ground assumed in the motion to dismiss, and more perspicuously presented in the second bill of exceptions, embodying a charge given by the Court to the jury, namely: "The action is founded on an agreement to deliver a wagon to the plaintiff within a certain period, and if the plaintiff has failed to prove the consideration, &c., the jury should find for the defendant, as the doctrine in reference to promissory notes, which are always presumed to be based upon a consideration, does not apply to such agreements."

This instruction the jury disregarded, for there is no evidence of the consideration having been proved; yet they found for *Maxwell*.

The motion to dismiss was correctly overruled; but the instruction given was erroneous. The question is not a new one in this Court. In *Findley* v. *Cooley*, 1 Blackf. 262, the point was first raised and settled. Whatever may be the foundation of that decision, it is found too valuable

in practice to be now disturbed. There are several decisions since, applying the principle to notes payable in property, as well as to those payable in money; and to those payable upon a contingency. 8 Blackf. 493. In the case of *Mountjoy* v. *Adair*, the note, like that now before us, was for the delivery of a wagon, and the Court held that the consideration need not be alleged. 1 Ind. R. 254. So, in a subsequent case, the Court held that a note payable in property may be declared on without setting out the consideration. 1 Ind. R. 401. Indeed, taking the leading case, *Findley* v. *Cooley*, for our guide, the 6th section of the act making notes, &c., assignable, in connection with the context, does not seem susceptible of any other reasonable construction. R. S. 1843, p. 576. A note in the hands of an assignee would, in most cases, be worthless if he were compelled to allege and prove the consideration. Hence the statute very properly shifts the burden of proof to the defendant; permitting him to plead and prove the want or failure of consideration. The very fact that all that class of instruments, whether payable in money or property, are grouped together in one section, without any distinction, indicates very clearly the intention of the legislature to put them all on a par.

The second bill of exceptions contains, also, all the evidence. Immediately following the instruction referred to, the record proceeds: "Thereupon the jury returned their verdict," &c. "Whereupon the defendant moved the Court in arrest of judgment; which motion was overruled. And also for a new trial, which was also overruled," &c., and correctly. According to the best authorities on pleading and practice, the making of the motion in arrest *first*, was fatal to the motion for a new trial. It is like pleading in bar first, and then filing a dilatory plea. Thus, if a motion in arrest of judgment be first made, you cannot afterwards move for a new trial. 1 Sellon Pr. 505. *Stephen*, in his treatise on special pleading, and the elementary writers generally, speaking of these motions in their order, say, the party may move for a new trial, and then

May Term, 1853.

KEEFER v. THE STATE.

in arrest, &c. Steph. 126.—2 Ind. R. 117. This rule is well settled.

The erroneous instruction, disregarded as it was by the jury, cannot affect the verdict, which is fully sustained by the evidence. The motions to dismiss and in arrest were also correctly overruled; so that the judgment of the Court is in accordance with the strict rules of pleading, and the exact justice of the case.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

R. Brackenridge, for the plaintiff.

KEEFER *v.* THE STATE.

4 246
141 36

An indictment charging the defendant with receiving and concealing stolen goods, is not bad for duplicity.

A defendant may be charged in one count of an indictment with stealing and in another with receiving stolen goods.

Monday, June 6.

APPEAL from the *Allen* Circuit Court.

ROACHE, J.—This was an indictment against *George Keefer* for grand larceny.

The first count alleges a larceny of three log chains.

The second count charges that the defendant, "three log-chains, of the value of 3 dollars each, of the personal goods," &c., "which had been before that time feloniously stolen, taken and carried away, did then and there have, receive and conceal, he, the said *George Keefer*, then and there well knowing said log-chains to have been, as aforesaid, feloniously stolen," &c.

Before plea, the defendant moved the Court to quash

the second count on the ground of duplicity. His motion was overruled.

On a trial, there was a verdict of guilty. Motion for a new trial overruled, and judgment on the verdict.

The defendant below insists that receiving and concealing are such distinct offences that they cannot be joined in the same count.

The receiving and concealing of a specified stolen article may be distinct acts, yet they are necessarily parts of the same transaction. By the statute, the nature of the crime and the punishment are the same. The fact of his being charged with the two acts, which together make up and are but parts of the same transaction, could not mislead or embarrass the defendant in making his defence. *Regina* v. *Bowen*, 1 Carr. and Kirwan 501, is an analogous case. The indictment was founded on a statute which enacted, "That if any person shall wilfully destroy, deface, *or* injure," &c., "any such register, or any part thereof," every such offender shall be guilty of a felony. The indictment charged that the defendant "feloniously and wilfully did destroy, deface, *and* injure a certain register," &c.

It was objected, on a motion in arrest of judgment, that three distinct, separate felonies were charged, viz., the *destroying*, the *defacing*, and the *injuring* the register. The Court, thirteen judges being present, decided the indictment to be good, notwithstanding any one of the three acts charged was a felony. The acts were so intimately connected, that the defendant could not possibly be misled by their joinder in the same count, either as to the nature of the accusation against him, the defence proper to be made, or the evidence necessary to be adduced in support of it. (1)

It is further objected, that there was a misjoinder of counts. No such objection appears to have been made below. But if it had been, it should have been overruled.

A defendant may be charged in one count of an indictment with stealing, and in another with receiving, &c. See Arch. Cr. Pl. 60.—*Redman* v. *The State*, 1 Blackf. 429.

May Term, 1853.

CONES v. VANOSDOL.

Per Curiam.—The judgment is affirmed with costs.

W. W. Carson, for the appellant.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

(1) See, also, *The State* v. *Slocum*, 8 Blackf. 315.—*Dormer* v. *The State*, 2 Ind. R. 308.—*The State* v. *Ryman*, *id.* 370.

CONES *v.* VANOSDOL.

An award made under c. 44, R. S. 1843, and signed and returned to the Circuit Court by the arbitrators named in the submission, is not vitiated or annulled by being also signed by a third person who had no authority to act.

The agreement for the submission of a cause to arbitration provided that all matters of difference therein pending, &c., should be referred to the arbitrament and determination of *A.* and *B.*, with liberty to the arbitrators, either before they entered upon the arbitration, or at any time pending the reference, to appoint an umpire; and that they, or a majority of them, should make their award in writing, and return the same. *Held*, that the person designated as an umpire, was intended to be merely an arbitrator.

A term improperly employed in a written agreement will not control its construction where the meaning of the parties is palpable.

Objections to a person's sitting as an arbitrator ought to be made at the trial before the arbitrators.

The R. S. 1843 require that the arbitrators shall be sworn, but do not require that the award shall contain evidence thereof.

That fact may be shown *aliunde*.

The defendant against whom an award was made, under c. 44, R. S. 1843, appeared to a motion to have the award entered of record. The Court granted the motion, the defendant not excepting thereto, and also a rule requiring the defendant to show cause, &c. *Held*, that it must be presumed that a copy of the award had been duly served upon the defendant.

The order of submission of a cause recited that all matters of difference in the cause now pending in, &c., on appeal, wherein *A.* is plaintiff and *B.* is defendant, are hereby referred to the arbitrament, &c. The award, after specifying the reference and the names of the arbitrators, was as follows: And they do, by these presents, award of and concerning the matters referred as follows, that is to say: the said arbitrators

award and adjudge that the said *B.* shall forthwith pay or cause to be paid to the said *A.* the sum of 30 dollars, in full satisfaction and discharge of and for all matters in difference referred as aforesaid. *Held*, that the award was abundantly certain, definite and comprehensive.

Where the parties to an arbitration have, by their agreement, fixed upon the rule which is to govern the question of costs, the arbitrators are precluded from making any order on the subject; and an order made by them, under such circumstances, is void.

Such an order will not, however, invalidate the residue of the award.

A cause was taken by appeal from a justice's judgment to the Circuit Court, and while there was submitted to arbitration, upon an agreement that the costs were to be disposed of according to the rules prescribed by statute in cases appealed from justices' judgments. The judgment for the plaintiff, before the justice, was for 18 dollars, and in the Circuit Court, upon the award, for 30 dollars. *Held*, that the judgment carried full costs.

ERROR to the *Rush* Circuit Court.

Monday, June 6.

ROACHE, J.—This suit was originally commenced before a justice, who, upon a trial, rendered a judgment for 18 dollars in favor of *Vanosdol*, the plaintiff below.

Cones appealed to the Circuit Court, where, by an agreement signed and filed by the parties, all the matters in difference in the cause were submitted to arbitration.

At the following term the parties appeared, and, on motion of the plaintiff below, the Court ordered the award of the arbitrators, which had been previously filed, to be entered of record, and granted a rule against *Cones*, the defendant below, to show cause why judgment should not be rendered against him on the award. The cause was then continued, and at the next term *Cones* showed cause against the rendition of judgment. The Court overruled all his exceptions, except one in relation to costs hereafter mentioned, and rendered a judgment against him upon the award, for 30 dollars, with full costs.

The decision of the Court, in overruling his exceptions to the award, is the error complained of.

The causes shown by the plaintiff in error against the rendition of judgment, are as follows:

1. That one *Hite* was permitted to act, sit, and decide as one of the arbitrators in said cause, contrary to the rule of reference, and contrary to law.

May Term, 1853.

Cones v. Vanosdol.

2. That it is not shown in and by said award, or the papers connected therewith, that said arbitrators, or either of them, were sworn.

3. That no notice of the award was ever served on said defendant.

4. That said award is indefinite and uncertain, and does not show what matters were passed upon by said arbitrators.

5. That said arbitrators assumed a power not conferred upon them by the agreement of submission.

6. That said *Hite* was chosen and acted as an arbitrator, when he should only have acted as an umpire.

7. And for other imperfections in said award, &c.

The proceedings in this cause, subsequent to the agreement of the parties to refer to arbitration, were had under, and are to be governed by, the provisions of chapter 44 of the R. S. 1843, p. 786. The mode of returning the award into Court, the method of enforcing it, and the causes which may be shown against the rendition of a judgment upon it, are all distinctly and clearly indicated.

We proceed to examine whether the exceptions taken by the plaintiff in error to the award, were valid.

The first and sixth causes assigned are substantially the same, and we shall examine them together.

The award was signed and returned by both the arbitrators named in the submission. It was their award, notwithstanding it was also signed by a third person who had no authority to act. His signature could not vitiate and annul their action. But we are of opinion that a fair construction of the agreement of submission and rule of reference, authorized *Hite* to sit and act as an arbitrator, notwithstanding he is designated as an umpire. They are as follows: "That all matters of difference in the cause now pending," &c., "be and the same are hereby referred to the arbitrament and determination of *William E. Dobbins* and *James Simmons*, with liberty to said arbitrators, either before they enter upon said arbitration, or at any time pending said reference, to appoint and name an umpire, and that they, or a majority of

them, shall make their award in writing, and return the same."

The office of an umpire is to decide in case of the disagreement of the arbitrators. He does not act at all, unless they fail to agree. But the whole context of the agreement, taken together, shows that such was not the part intended by the parties to be filled by the individual designated as an umpire. The use of the word majority would be a sheer absurdity, if the individual named an umpire was not to be held to be a third arbitrator, whose selection was left to the other two. The language is express, that a majority should make the award, and there could be no majority if but two were to sit. The term umpire was evidently used without a very definite conception of its legal meaning; but the mere improper use of a term cannot be permitted to control the construction of an agreement, when the meaning of the parties is palpable.

We are therefore clearly of opinion that *Hite* was properly chosen as an arbitrator, and that his acts as such were authorized by the terms of the agreement of submission.

Besides, the award shows that both the parties appeared and were heard before the arbitrators. If any objection existed against *Hite* sitting and taking part in the deliberations, as an arbitrator, the objection should have been raised then. By attending in person before the three, all sitting and acting as arbitrators, producing his proofs and interposing no protest against the authority of *Hite* to sit and act as one of them, he has furnished a very strong argument in favor of the interpretation given by the Court to the agreement of submission. If the objection was a valid one, it ought to have been made on the trial before the arbitrators. It was then as well known to *Cones* as on the return of the award to the Circuit Court. In *Barlow* v. *The State*, 2 Blackf. 114, which was an indictment for a felony, the defendant moved, after verdict, for a new trial, on the ground that two of the petit jurors were members of the grand jury which found the indict-

May Term, 1853.

CONES v. VANOSDOL.

ment. That fact was known to the defendant at the time of impanneling the jury. The Court held that "it was a good cause of *challenge*, but being known to the party, and not mentioned at the proper time, the right was waived."

The second cause shown is without foundation. It is true the statute requires the arbitrators to be sworn, but it does not require that the award shall contain evidence of the fact. It may be shown *aliunde*. *Jacobs* v. *Moffatt*, 3 Blackf. 395.

The third exception does not go to the validity of the award, but is, in effect, a denial that the defendant had taken one of the steps necessary to entitle himself to the statutory provisions for enforcing it. By the 13th section of chapter 44, the Court cannot order the award to be entered of record, until proof is made, not only of the execution of the award, but also "that a copy of the award has been duly served on the party against whom the rule is asked." The service of the notice was a preliminary step necessary to entitle the plaintiff to the benefit of the statutory provisions on the subject. Without proof of such service, it was not competent for the Court to take the next step in the proceeding—to order the entry of the award upon the record. The record discloses the fact that the defendant below entered his appearance, and that the Court made an order that the award be entered of record, and granted a rule requiring the defendant to show cause, &c. No exceptions were taken to the order of the Court. The service of the copy was a matter which would not necessarily appear upon the award or accompanying papers, but was a fact which it was incumbent on the party seeking to convert the award into a judgment, to prove on presenting the award to be entered of record.

At that, which was the proper stage of the proceedings for such an objection, there was no attempt made by the defendant to prevent the entering of the award of record by showing, as he had the undoubted right to do, that he had not been properly served with a copy. We must,

therefore, presume in favor of the action of the Court below, that the order was based on the state of evidence prescribed by the statute.

We now proceed to the fourth exception. The order of sumission recites "that all matters of difference in the cause now pending in the *Rush* Circuit Court on appeal, wherein the said *Cornelius Vanosdol* is plaintiff, and *Samuel Cones* is defendant, be and the same are hereby referred to the arbitrament," &c. The language of the award, after specifying the reference, and the names of the arbitrators, is, "do by these presents award of and concerning the matters referred, as follows, that is to say: the said arbitrators award and adjudge that the said *Samuel Cones* shall forthwith pay or cause to be paid to the said *Cornelius Vanosdol*, the sum of 30 dollars, and that the same be received by the said *Cornelus Vanosdol* in full satisfaction and discharge of and for all matters in difference referred as aforesaid." The reference embraced all matters of difference in the appeal. The award adjudges 30 dollars to be paid by the one party to the other, in full satisfaction and discharge of all the matters in difference referred. It is abundantly certain, definite and comprehensive.

The fifth exception was well taken, and was sustained by the Court below. The arbitrators adjudged that *Cones* should pay all the costs. In this they exceeded their powers.

In the agreement to submit, it was provided that "the rules prescribed by statute in cases on appeal to the Circuit Court from judgments of justices of the peace, shall govern the said parties as to the payment of all costs which have or may hereafter accrue in said cause." The parties having by their agreement fixed upon the rule which was to govern the question of costs, the arbitrators were precluded from making any order on the subject. That part of the award was void, and was, upon the plaintiff's exception, properly set aside by the Circuit Court. But this did not invalidate that portion of the award which adjudicated matters within the scope of their powers. It did not affect the merits of the decision

May Term, 1853.

CONES v. VANGORDOL.

upon the matters which were submitted. See s. 17, c. 44, R. S. 1843.—Kyd on Awards, p. 166.—Cald. on Arb. 120.

The plaintiff in error also insists that the Circuit Court erred in taxing the costs against him, and insists that upon setting aside the award as to costs, the Court should have only entered a rule against him to show cause why a judgment for costs should not be rendered against him. No authority is cited, and we know of no such rule in cases of this kind.

By the terms of the agreement of submission above quoted, the parties leave the question of costs to be disposed of "according to the rules prescribed by statute, in cases appealed from the judgments of justices of the peace."

The judgment before the magistrate was 18 dollars; in the Circuit Court, 30 dollars. Such a judgment carried full costs. R. S. 1843, p. 892.—Cald. on Arb. 71, 72.

On the whole, we regard it as very clear that no one of the objections raised by the plaintiffs in error, furnished a sufficient reason for setting aside the award. They are certainly not good cause against the rendition of a judgment, under the provisions of our statute. Whether, or how far the party might have availed himself of some or all of them, on a question of a continuance or costs, in the Court below, if taken advantage of at the proper time, is not a question presented by the record.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. Robinson, for the plaintiff.

F. Bigger and *R. D. Logan*, for the defendant.

May Term, 1853.

WOLFE, Administrator, *v.* WOLFE.

WOLFE v. WOLFE.

A *fi fa.* was issued in *May*, 1848, levied on a wagon, and returned in *June* of that year, with an indorsement that the wagon was not sold for want of a buyer. Its return-day, by the R. S. 1843, was in *May*, 1849. In *March*, 1849, another *fi. fa.*, instead of a *vendi.*, was issued on the same judgment, levied on said wagon, and returned on the 13th of that month, with a like indorsement. *Held*, that, under the R. S. 1843, the lien of the first *fi. fa.* continued until *May*, 1850, and the wagon remained liable to be sold on a *vendi.* issued before that time. *Held*, also, that the issuing of the second *fi. fa.* was irregular, and did not affect the right to issue a *vendi.* subsequently on the first.

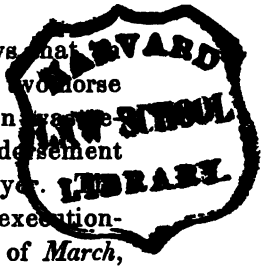
Monday, June 6.

ERROR to the *Vigo* Circuit Court.

PERKINS, J.—Trial of the right of property.

Ephraim S. Wolfe filed with a justice of the peace a claim to a two-horse wagon which had been taken by a constable on an execution in favor of *D. J. Wolfe*, administrator upon the estate of *Jacob Wolfe*, deceased, against *John Farmer* and *John Hay*. The claim was filed on the 13th of *November*, 1849.

The cause went by appeal to the Circuit Court. Judgment there for the plaintiff, and a motion for a new trial overruled.



The evidence is upon the record, and shows that an execution issued and was levied upon said two-horse wagon in *May*, 1848, and that said execution was returned *June* 20th of the same year, with an indorsement that said wagon was not sold for want of a buyer. The plaintiff purchased the wagon of one of the execution-defendants in the fall of 1848. On the 7th of *March*, 1849, a new *fi. fa.*, instead of a *vendi.*, issued to the same constable, upon the same judgment, which he levied on said wagon, and, on the 23d of the said month, returned with the indorsement that said wagon remained unsold for want of a buyer.

During the existence of the first execution, and subsequently, the return-day of an execution was at the end of a year from its issue; and it is enacted in the R. S. of 1843, p. 750, that when an execution is levied upon pro-

May Term, 1853.

BECKETT v. BLEDSOE.

perty and returned with an indorsement that said property is not sold for want of bidders, "such levy and return shall continue and constitute a lien on the property remaining unsold, by virtue of which the same may be held and sold on a writ of *venditioni exponas*, if issued before the return-day next after the return-day of such previous executions."

The *fi. fa.* first levied on the wagon in question was issued in *May*, 1848, and its return-day was, therefore, in *May*, 1849. The return-day of an execution next after that would be in *May*, 1850. Till that time, as we understand the statute, the lien of the first execution continued, and the property remained liable to be sold on a *vendi.* issued before that time.

The claim in this case was filed in *November*, 1849, while the property was held by the execution, and hence, could not be sustained.

The second *fi. fa.* was irregular, but it would not prevent the issue of a *vendi.* on the return to the first, at any time before *May*, 1850.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. B. Gookins, for the plaintiff.

J. P. Usher, for the defendant.

BECKETT *v.* BLEDSOE.

A. being the owner of land mortgaged to the school fund, and being about to remove to another state, appointed *B.*, who lived near the land, his agent to lease it, &c., and to renew the mortgage at the expiration of the time it had to run. *B.* leased the land, &c., but did not renew the mortgage, an affidavit of the principal being necessary for that purpose. The land was sold, for the non-payment of the mortgage, and *B.* became

May Term, 1853.

BECKETT v. BLEDSOE.

the purchaser, and received a deed. More than nine months elapsed after *B.* knew he could not renew the mortgage, before said sale. *B.* afterwards sold to *C.*, an innocent purchaser without notice of his agency, for a larger sum than the price paid by him, and left the state. *A.*, without having demanded of *B.* an account, filed his bill against *B.* and *C.*, praying that the land might be conveyed to him, and for general relief. *Held*, that it was the duty of *B.*, as soon as he ascertained that he could not renew the mortgage, to give *A.* notice; and that *B.'s* purchase must be regarded as a mere trust for the benefit of *A.*, who was entitled to the profits made by *B.* on the sale. *Held*, also, that *B.'s* non-residence excused a demand for an account before suit. *Held*, also, that *C.'s* title could not be disturbed.

The residence of [illegible] in another and distant state, and his ignorance of the fraud practised by [illegible], was also *held* to excuse what would else have been an improper delay in bringing said suit.

Monday, June 6.

ERROR to the *Hendricks* Circuit Court.

PERKINS, J.—*Bledsoe* filed a bill in the *Hendricks* Circuit Court, stating that in 1837 he received a conveyance of a tract of land of one *David Smith*, twenty-five acres of which was encumbered by a mortgage previously given by said *Smith* to the commissioner of the school fund for 55 dollars, due the 16th of *November*, 1838, with 6 per cent. interest, payable annually in advance; that he took and retained possession of said land till the spring of 1838, when he removed to *Arkansas*, where he has since resided; that previous to leaving, he paid the interest on said mortgage up to the 16th of *November*, 1837, and appointed *Beckett*, who resided near the land, his agent to lease said land for him, attend to paying the interest on the mortgage out of the rents, and to renew said mortgage on the expiration of the time it had to run; that *Beckett* leased the land, received the rents, but did not pay the interest on said mortgage nor renew it, but permitted the school commissioner to sell the land, which he did in *August*, 1839, *Beckett* himself becoming the purchaser, at 100 dollars, and receiving the deed from the commissioner in his own right; that he, *Beckett*, kept and enjoyed the use of said land till *September*, 1849, when he sold it to one *Bunton* for 325 dollars, and left the state for parts unknown. Prayer that the land be conveyed to the plaintiff in the bill, and for general relief.

May Term, 1853.

BECKETT v. BLEDSOE.

Notice of the pendency of the bill was given by publication.

Bunton answered, denying notice of *Beckett's* agency, and asserting his purchase to have been made in good faith.

Beckett answered, admitting his agency, his reception of rents to the amount of 40 dollars, his agreement to re-mortgage the land, &c., and says in excuse for not doing it, that he found it required an affidavit which he could not make, but which it was necessary that *Bledsoe*, his principal, should make, and further says that after he purchased and received a deed for the land of the school commissioner, he wrote and deposited in the post-office a letter to *Bledsoe*, informing him that he could have the land by paying the 100 dollars. The reception of this letter by *Bledsoe*, and the writing of it, even, by *Beckett*, are denied by the replication to the bill, and there is no proof of either of the allegations. *Beckett*, in his answer, further admits the sale to *Bunton*, and his removal from the state, which, he says, was to *Iowa*.

The cause was submitted to the Court on the bill, answers, and replication, and the Court decreed that the bill should be dismissed as to *Bunton*, that *Beckett* should pay to *Bledsoe* the 40 dollars, without interest, admitted to have been received for rent, and the 200 dollars received from *Bunton*, over and above the 100 dollars paid for the land, with interest for two years thereon, making in all, says the decree, the "sum of 263 dollars, to be levied as a judgment at common law, and also his costs," &c.

There is plainly a clerical error in stating the aggregegate amount of this decree.

Beckett brings the case to this Court, and contends that said decree is erroneous—

1. Because no demand for an accounting was made upon him before the filing of the bill.

But his non-residence excused the making of a demand. *West* v. *Chase*, 3 Ind. R. 301.

2. Because he had a right to make the purchase and

sale of the land as he did, and retain the profit for his own benefit.

In this we think he is in error. The agent, in this case, was guilty of negligence amounting to a breach of duty, in failing, when he discovered that he could not re-mortgage the property, immediately to notify *Bledsoe* of the fact, that he might devise ways and means to save it from sale. More than nine months elapsed after the agent, *Beckett*, knew that he could not re-mortgage, before the sale. By withholding information of the fact from his principal, the agent was enabled to obtain the property at a sacrifice; and to hold, as a general rule, that such a transaction could be supported, would furnish the strongest inducement to the practice of bad faith on the part of agents. *Beckett* must be regarded, after his purchase, as a trustee, holding the land for the benefit of *Bledsoe;* and as *Bunton* purchased without notice of the trust, it was right to abstain from disturbing his title, and to decree that the profits made by *Beckett* in the transaction, should be paid to *Bledsoe.*

The only circumstance in the case against the latter is his delay in asserting his title to the land; but his residence in a distant state, and his entire ignorance of the fraud, excuse that.

We have said that there is an error in the statement of the amount of the decree. The Court below intended to give, as is stated in the finding, to *Bledsoe*, the amount of rent admitted, 40 dollars; the amount for which *Beckett* sold the land over what he paid for it, 225 dollars; interest for two years on this latter sum, 27 dollars; making, in all, 292 dollars.

The decree will be corrected accordingly, and affirmed for that amount, with interest from its rendition below.

Per Curiam.—The decree, as above corrected, is affirmed with costs.

C. C. Nave, for the plaintiff.

J. S. Harvey, for the defendant.

May Term, 1853.

HOTCHKISS v. JONES.

Hotchkiss and Others *v.* Jones.

4 260
140 346
4 260
145 73

In replevin, only compensatory damages can be given.

In replevin, where no damages are alleged, the amount of the recovery cannot exceed the alleged value of the property.

It appeared by the briefs of the counsel in a cause that judgment had been rendered for more than was due, in order to give the Supreme Court jurisdiction and extract an opinion on certain points supposed to be at issue in the case; and the character of the proceedings, as shown by the record, indicated that such was the fact. The Supreme Court affirmed the judgment, without investigating the grounds on which it was rendered.

Monday, June 6.

ERROR to the *Tippecanoe* Circuit Court.

ROACHE, J.—*Jones*, the plaintiff below, commenced an action of replevin before a justice of the peace for the unlawful taking of two hogs, of the value, as alleged in the affidavit, of 8 dollars.

The case was appealed to the Circuit Court. There the cause was submitted to the Court for trial. The finding and judgment of the Court are in the following words:

"And the Court, after hearing the evidence and being fully advised in the premises, do find for the plaintiff, and assess his damages at twenty-one dollars. It is therefore considered by the Court now here, that the said plaintiff do have and recover of and from said defendants the said sum of twenty-one dollars in damages, and also the costs and charges in this behalf paid, laid out and expended."

In the affidavit filed before the magistrate, which is the only cause of action, the whole value of the property alleged to have been taken is only 8 dollars, and no damages whatever are claimed. The transcript of the justice shows that the property had been delivered to the plaintiff on his giving the requisite bond. In addition to his property, the Circuit Court has given him a judgment of 21 dollars in damages.

There could have been but one purpose in the parties, in procuring the rendition of such an extraordinary judgment—one entirely unwarranted by the cause of action, and inconsistent with the nature of the action. The affi-

davit claims the property to have been of the value of only 8 dollars, and no damages are alleged. It is an action in which only compensatory damages are to be given. Under no circumstances could there have been a judgment for more than 8 dollars, the alleged value of the hogs. But the transcript shows that the hogs had been delivered to the plaintiff below.

It is asserted by the defendant's counsel, in their brief, that the judgment was thus rendered by an agreement of the parties, in order to give jurisdiction to this Court and extract an opinion upon certain questions supposed by them to be at issue in the case. The counsel for the plaintiffs in error, in replying to that portion of the defendant's brief, do not deny that such was the fact; but insist that we must look to the record to determine our jurisdiction. The character of the proceedings, as shown by the record, leaves no doubt on our minds that such was the fact. This is just as objectionable as if the suit had been fictitious in its origin.

We do not, therefore, look into the questions sought to be raised in the case, but affirm the case without investigating the grounds on which it was rendered. See *Brewington* v. *Lowe*, 1 Ind. R. 21.

Per Curiam.—The judgment is affirmed with costs.

G. S. Orth and *E. H. Brackett*, for the plaintiffs.

R. C. Gregory, for the defendant.

Best *v.* Ellsworth.

Debt upon a promissory note under seal. Plea, that the note, and two others, were given by the defendant to the plaintiff in consideration of the sale of a tract of land therein described, and for no other consideration; which land the latter agreed to convey to the former, by good war-

May Term, 1853.

MARKLEY v. DOE.

ranty deed, on the payment of said notes. Averment, that one of the notes had been paid, to-wit, &c., and that, before the bringing of the suit, both of the remaining notes were due, but that the plaintiff did not, before the bringing of the suit, convey or offer to convey to the defendant the land upon the payment of the notes. *Held*, that the plea was good.

Monday, June 6.

ERROR to the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—Debt on a promissory note under seal.

Plea, that the note sued on and two others, were given by the said defendant to the said plaintiff, in consideration of the sale of a certain tract of land therein described, and for no other consideration; which said land the latter agreed to convey to the former, by good warranty deed, on the payment of said notes. Averment, that one of said notes had been paid, to-wit, &c., and that before the bringing of this suit, both of the remaining notes were due, but that the said plaintiff did not, before the bringing of this suit, convey or offer to convey to defendant the said land, upon the payment of said notes.

This plea is similar to the pleas in *Ireland* v. *Chauncey*, *ante*, p. 224, and *Ellis* v. *Hubbard*, *ante*, p. 206, which were held to be good.

The demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. C. Gregory, *R. Jones*, and *W. F. Lane*, for the plaintiff.

J. A. Wilstach, for the defendant.

MARKLEY *v.* DOE on the demise of STUDEBAKER.

Monday, June 6.

ERROR to the *Wells* Circuit Court.

DAVISON, J.—This was an ejectment for twenty acres of

land in *Wells* county, being all that part of the north-east fraction of the south-east quarter of section eighteen, in township twenty-six north, of range thirteen east, west of the line running north and south, and dividing the said south-east quarter and the north-east quarter of said section.

The cause was submitted to a jury. Verdict for the plaintiff. Motion for a new trial overruled, and judgment upon the verdict.

Upon the trial, the plaintiff gave in evidence a patent from the *United States* to *Abraham Studebaker* for the east half of the north-east quarter, and the north-east fraction of the south-east quarter of section eighteen, in township twenty-six north, of range thirteen east. He then gave in evidence a deed in fee for the land described in said patent, from *Abraham Studebaker* to the lessor of the plaintiff; and proved that the land in dispute lay on the north-east side of the *Wabash* river, and south of a line drawn from quarter-post to quarter-post of the original survey from east to west through the center of said section, and west of a line, as appeared from a plat given in evidence by the defendant, drawn from north to south through the center of the south-east quarter of said section.

The plaintiff here rested.

The defendant gave in evidence a patent from the *United States* for the west half of the north-east quarter, and the north-east fraction of the north-west quarter of section eighteen, in township twenty-six north, of range thirteen east. He also gave in evidence an exemplification of the transcripts of the plat of said township, under the certificate of the commissioner of the general land-office of the *United States;* and proved that he had been in possession of the land in controversy for the last ten years, and had made valuable improvements thereon.

The evidence here closed, and the Court gave various instructions to the jury; but as they appear to be unexceptionable, and present no point for our consideration, we will not give them any further notice.

May Term, 1853.

BEPLEY v. THE STATE.

This judgment must be affirmed. The record contains all the evidence in the cause. We have examined it carefully, and are satisfied that the land in dispute is a part of the north-east fraction of the south-east quarter of section eighteen, in township twenty-six north, of range thirteen east, and is, therefore, covered by *Studebaker's* patent; and that the defendant has failed to establish title to any portion of that fraction.

The motion for a new trial was properly overruled.

Per Curiam.—The judgment is affirmed with costs.

E. A. McMahon, for the plaintiff.

R. Brackenridge, for the defendant.

BEPLEY *v.* THE STATE.

4 264
170 540

Proceedings in form similar to those in *Lindville* v. *The State*, 3 Ind. R. 580, held to be good for the reasons there given.

Prosecution for a nuisance under s. 17 of the act of *March*, 1853, regulating the retail of spirituous liquors. There was evidence tending to prove that the defendant, on a single occasion, sold liquor by a less quantity than a gallon, and suffered it to be drank in his house. It appeared also that he had bottles of different kinds of liquor usual in retail establishments. *Held*, that it was for the jury to say whether this evidence was sufficient; and having so decided, in a matter peculiarly within their province, the verdict ought not to be disturbed.

Where the defendant has moved in arrest of judgment, he cannot afterwards take the opinion of the Court on the sufficiency of the evidence on a motion for a new trial, unless he brings himself within some of the recognized exceptions.

It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly.

Whether a law is politic or expedient or necessary, is not a question with which the courts have anything to do.

May Term, 1853.

BEPLEY v. THE STATE.

Monday, June 6.

APPEAL from the *Hamilton* Court of Common Pleas.

STUART, J.—This was a prosecution for a nuisance, under the 17th section of the act of *March*, 1853, regulating the retail of spirituous liquors. Trial by jury. Verdict and judgment for the state.

A motion to quash made before trial was correctly overruled. In form the proceedings are similar to the case of *Lindville* v. *The State*, decided at the *November* term, 1852 (1); and for the reasons there given are substantially good.

There was evidence tending to prove that *Bepley*, on a single occasion, sold liquor by a less quantity than a gallon, and suffered it to be drank in his house. It appeared also that he had bottles of different kinds of liquor usual in retail establishments. It was for the jury to say whether this evidence was sufficient. Having so decided in a matter peculiarly within their province to decide, we think the verdict ought not to be disturbed. 4 Blackf. 247.

There is a technical point, well settled in the books, but often overlooked in practice, which would restrain us from disturbing the verdict, if we were otherwise so disposed. The defendant moved first in arrest of judgment. According to the authorities he could not afterwards take the opinion of the Court below on the sufficiency of the evidence, by a motion for a new trial, unless he had brought himself within some of the recognized exceptions, which he has not done. In the order in which they were made the one motion was fatal to the other. *Rogers* v. *Maxwell*, *ante*, 243.—2 Ind 117.

The constitutional question so elaborately argued by counsel, does not arise in the record. The 17th section is not liable to any objection of that kind. It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly. This is fully recognized in the elaborate liquor cases decided in 5th Howard U. S. R. 504, *et infra*.

Whether the law is politic or expedient or necessary, is not a question with which the courts have anything to

May Term, 1853.

MONTGOMERY v. DOE.

do. That lies between the people and those to whom they delegate the temporary power of making laws. If the act is not a reflection of public sentiment, neither the responsibility nor the remedy lies with the courts.

No inference is to be drawn that the Court considers the whole act constitutional. There is sufficient in the statute, independent of the parts which counsel deem unconstitutional, to execute the 17th section and support the judgment of the Court below; 2 Blackf. 8; and this is all which the case at bar brings judicially before us.

Per Curiam.—The judgment is affirmed with costs.

W. Garver, for the appellant.

D. C. Chipman, *J. Robinson*, *R. A. Riley*, *N. B. Taylor*, and *J. Coburn*, for the state.

(1) 3 Ind. R. 580.

MONTGOMERY and Another *v.* DOE on the demise of PEARSON.

A bill of exceptions, in noticing the evidence given at the trial, after stating the submission, &c., proceeded, "The plaintiff, to support the issue on his part, proved," &c., (setting out certain evidence). It then proceeded thus: "The defendant then read in evidence," &c., setting out certain other evidence. Immediately following were these words: "And the Court being sufficiently advised, take time," &c. *Held*, that the language did not show with sufficient certainty that the bill contained all the evidence given at the trial.

Monday, June 6.

ERROR to the *Pike* Circuit Court.

STUART, J.—Ejectment. Trial by the Court; finding for the plaintiff below; motion for a new trial overruled, and judgment on the finding.

The first question to be settled is, whether the bill of exceptions contains all the evidence. On this depends the further investigation of the case in this Court.

The bill, after stating the submission, &c., proceeds,

"the plaintiff to support the issue on his part, proved that," &c., setting out certain instruments of evidence, title, possession, &c. It then proceeds further, thus: "The defendants then read in evidence," &c., setting out a judgment, recognizance, sundry executions, a sheriff's deed, &c. Immediately following are these words: "and the Court not being sufficiently advised, take time until the next term, and day is given, &c."

Does this bill show with sufficient certainty that it contains all the evidence submitted to the Court on the trial? On the authority of *Reno* v. *Crane*, 2 Blackf. 217, and *Lurton* v. *Carson*, *id.* 464, we must conclude that it does not. There is nothing in the phraseology or the facts to support the inference that all the evidence is embraced in the bill. It is very similar to *Doe* v. *Hall*, 2 Ind. R. 24, and the ruling in that case must be regarded as conclusive in this.

In this view of the question, there is no other point judicially before us. The Court below is presumed to have had sufficient evidence to sustain the finding and judgment.

Per Curiam.—The judgment is affirmed with costs.

S. Judah, for the plaintiffs.

G. G. Dunn, for the defendant.

Burns *v.* Kerr.

APPEAL from the *Jasper* Circuit Court.

Perkins, J.—*Kerr*, for the use, &c., sued *Burns* on a sealed note for 50 dollars. Six pleas were filed, setting up want of consideration and fraud. Replications in denial of the pleas. Issues of fact. Waiver of a jury, trial by the Court, and judgment for the plaintiff.

May Term, 1853.

CLARK v. THE STATE.

The cause is brought to this Court upon the weight of the evidence.

It appears that the note was given by *Burns* to *Kerr* for the consideration of the purchase by the former from the latter, of a claim set up by the latter upon a certain quarter section of land owned by the *United States*. The note was given in 1839. At that time the sale of such claims was sanctioned by statute. Acts 1834, p. 60. The improvement shown by the evidence to have been made by *Kerr* upon the land claimed was very small, but we do not see how we can distinguish this case from *Givens* v. *Burget*, 7 Blackf. 577; and the plaintiff in this Court has not, by filing a brief, aided us in attempting to do so.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. Pettit and *S. A. Huff*, for the appellant.

D. D. Pratt, for the appellee.

CLARK *v.* THE STATE.

It is competent for the Circuit Court to which a change of venue has been granted, to change the venue back, upon a proper application, to the same Court that granted it.

A party by consenting to a change of venue and appearing to the action in the Court to which it is removed, waives his right to complain of any irregularity in the manner of the change.

A cause was continued by the Circuit Court until the next term, which was then fixed by law for *October*, but before *October* the legislature dispensed with or postponed the term until the spring thereafter. *Held*, that the cause was not discontinued.

An appearance after verdict waives a discontinuance.

Monday, June 6.

APPEAL from the *Henry* Circuit Court.

PERKINS, J.—*Clark* was indicted in the *Henry* Circuit Court for an assault and battery with intent to murder. At the fall term, 1850, he obtained a change of venue to the *Rush*

Circuit Court, where he appeared, at the spring term, 1851, and applied for a continuance to the next term of said Court. The continuance was refused; and "thereupon [says the record], by an agreement between the said prosecuting attorney and the said defendant, this cause is remanded to the *Henry* Circuit Court for trial, and the trial thereof set for the *Thursday* of the first week of the next term of said Court." The defendant entered into a recognizance to appear thereat accordingly. At that term, spring term, 1851, he did appear. He applied for a continuance, and obtained it, to the next term of said Court. At said term, fall term, 1851, he appeared, was tried by a jury, convicted, and assigned the punishment of a fine and two years' service in the penitentiary. After the return of the verdict, the defendant was called for sentence, and, not appearing, was defaulted, and the cause was continued. At the succeeding spring term, 1852, the entry is that the prosecuting attorney appeared and; on his motion, the cause was "continued until the next term of this Court." The next entry is that at the spring term, 1853, "the same being the next term of said Court after the spring term, 1852," comes the prosecuting attorney, "and the said defendant in person and by counsel comes also, and moves the Court in arrest of judgment," &c.; which motion was overruled, and the defendant sentenced upon the verdict of the jury. It is assigned for error—

1. That the Court had no jurisdiction of the cause; and,

2. That it had no jurisdiction of the person.

Upon the first assignment it is argued that the cause was legally removed from the *Henry* to the *Rush* Circuit Court, and that it was not legally returned from the *Rush* to the *Henry* Circuit Court.

We think there is nothing in this point.

It was competent for the *Rush* Circuit Court to grant a change of venue in the cause back to the *Henry* Circuit Court, upon a proper application. It did grant such change, and the defendant consented to it, and afterwards appeared in the cause in the latter Circuit Court. If there

May Term, 1853.

CLARK v. THE STATE.

was anything irregular, therefore, in the manner of taking the change, it was waived by the defendant. In *Bosley* v. *Farquar*, 2 Blackf. 61, where an objection like that in this case was made, the Court said, "if the venue had not been regularly changed, or not changed at all, from *Orange* to *Washington*, this matter should have been rectified in the *Washington* Circuit Court before any other proceedings were had in the case. As no objection was then made, nor, in fact, made at any time in that Court, none can avail here." And in *Wilson* v. *Coles*, 2 *id.* 402, where the cause had been continued, and there was afterwards, in the same term, a trial of it, both parties being present, it was held there was no error.

Upon the second assignment of error, it is said that at the time the continuance was entered at the spring term, 1852, the law fixed the next term of the *Henry* Circuit Court in the following *October;* but afterwards, and before that time, the term in *October* was, by legislation, dispensed with or postponed until the spring of 1853; and, hence, it is insisted that there was a discontinuance; but we do not think so. It was in the power of the legislature to change, regulate, and fix the terms of the Court; and, though the time of holding a term in *Henry* county was fixed at a more remote period of time than had been designated when the continuance was entered, still the continuance was to "the next term," and no term, in fact, intervened, as the spring term, 1853, was the next term. This is one answer to the objection.

Another is, that there was an appearance in this case on the motion in arrest of judgment after the alleged discontinuance, and an appearance waives a discontinuance that may have happened by a neglect to enter the proper continuance. Our statute enacts that no judgment on a verdict, *nil dicit*, &c., shall be reversed on account of a discontinuance, &c. R. S. 1843, p. 714. Had a discontinuance happened in any previous stage of the cause, therefore, the appearance and verdict would have cured it by statute, at least in a civil case. The appearance must also waive a discontinuance after verdict. The proposi-

tion is a general one. See *Humble* v. *Bland*, 6 T. R. 255. —Bouvier's Law Dic., Titles, continuance and discontinuance.—Burrill's Law Dic., same titles.

Per Curiam.—The judgment is affirmed with costs.

W. Grose, for the plaintiff.

R. A. Riley, for the state.

WESTON *v.* MURNAN, Administrator.

A note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against the co-administrator, unless accompanied by proof of an original indebtedness upon which the note was founded; and, when such proof is made, the note becomes only *prima facie* evidence, liable to be disputed on any ground which would have been valid as against such original indebtedness.

ERROR to the *Hancock* Probate Court.

Monday, June 13.

ROACHE, J.—In the Court below the parties went into trial, without process, by agreement. The cause of action was a note, as follows:

"*February* the 14th, 1845. Due *David Weston*, on the estate of *Joseph Weston*, deceased, forty-four dollars and eithty-three cents, by settlement. *John Weston*, Administrator."

On the trial, an agreed state of facts, signed by the parties, was filed, in which it was admitted that the note above set out was executed by *John Weston*, who, at the time of its execution, was administrator of the estate of the said *Joseph Weston*, in the state of *Arkansas;* that said decedent left an estate in that state, upon which letters of administration had been granted to said *John*.

This agreement and the note was all the evidence before the Court.

May Term, 1853.

WESTON v. MURNAN.

The finding and judgment were in favor of the defendant.

The question presented by the state of facts to the Probate Court, was, whether a note, which was an admission that a sum of money was due from the estate in part represented by him, was sufficient evidence in a suit against a co-administrator, to authorize a judgment thereon against him.

We are of opinion it was not.

In *James* v. *Hackley*, 16 Johns. R. 273, it was held that such a note was admissible, and was *prima facie* evidence against the co-administrator.

The doctrine in that case was subsequently reviewed, and, after a full discussion, overruled in *McIntire* v. *Morris*, Administrator, 14 Wend. 90. See, also, the same point decided in *Hammon* v. *Huntley*, 4 Cow. 493, and in *Forsyth* v. *Ganson*, 5 Wend. 558.

The doctrine held in the latter cases are abundantly sustained by the authorites cited, and by the reasoning of the Court.

We are therefore disposed to regard it as the settled law, that a note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against the co-administrator, unless accompanied by proof of an original indebtedness upon which such note was founded; and that when such proof is made, the note becomes only *prima facie* evidence, liable to be disputed on any ground which would have been valid as against such original indebtedness.

In the case at bar, there was no proof of indebtedness of the decedent to the plaintiff, or, indeed, of any consideration whatever for the note.

Per Curiam.—The judgment is affirmed with costs.

R. A. Riley, for the plaintiff.

T. D. Walpole, for the defendant.

Ross *v.* Helton.

In a suit brought upon the common count for goods sold, the parties, during the pendency of the action, entered into a written agreement, which was made a rule of Court, by their consent, by which the cause was submitted to *A.*, *B.*, and *C.* for their *award*, or the *award* of any two of them, &c., and said *arbitrators* after being duly sworn, should investigate and report to the Court, &c., the result of their investigation of all accounts in issue between the parties, &c. *Held*, that this was a "reference," under the R. S. 1843.

An objection that a report of referees was filed in vacation and not in open Court, must have been made before the Court below, or it will not be noticed on error.

ERROR to the *Lawrence* Circuit Court.

Monday, June 13.

Roache, J.—*Ross* recovered a judgment for 82 dollars against *Helton*, by default, before a justice of the peace, in an action of assumpsit. The case was taken by appeal to the Circuit Court. At the first term, the plaintiff filed a formal declaration containing the common counts for goods sold. The defendant pleaded non assumpsit, payment, and the statute of limitations. At this stage of the proceedings, the parties entered into the following agreement:

"It is agreed between the parties aforesaid that a cause now pending in the *Lawrence* Circuit Court, in which *James Ross* is plaintiff and *Andrew Helton* is defendant, shall be referred to *Joseph Henderson*, *James H. Anderson*, and *Josephus Hostetter*, for their award herein, or the award of any two of them; and said arbitrators, or any two of them, shall meet at such time as may be agreed on, and at *Heltonsville*, of which time and place each party shall have three days' notice, unless the time is agreed on; and said arbitrators, after being duly sworn, shall investigate and report to this Court, at its next term, the result of their investigation of all accounts now in issue between the said parties, as appears from the pleading in the cause; and to that end may cause to come before them such witnesses as either party may desire, and them

May Term, 1853.

Ross v. Helton.

to examine on oath in relation to said accounts. (Signed) *James Ross, Andrew Helton.*"

This agreement was thereupon made a rule of Court, by the consent of the parties, and entered of record accordingly.

At the next term of the Court, both parties appeared, and the award or report, signed by the three individuals named in the rule, having been filed in vacation, on motion was duly entered of record.

The award or report was a general finding of the matters in dispute, in favor of the defendant, and taxed the costs against the plaintiff.

A rule was taken against *Helton*, to show cause why judgment should not be rendered against him on the report.

Cause was shown by filing exceptions. The Court, after hearing all the evidence produced by the parties, overruled the exceptions, and rendered a final judgment in accordance with the report.

But one error is complained of here.

The plaintiff in error insists that the Court was mistaken in assuming this to be the case of a "rule of reference" for a report, when it was, in fact, "a submission to arbitrators" for an award; and that being an award, no judgment could be rendered upon it, because some of the formalities prescribed by the statute relative to arbitrations, had not been complied with.

It is unnecessary to examine whether there is any material difference, under our statute, between an "arbitration" and a "reference;" for the agreement and the rule of Court which followed it, possessed, substantially, all the characteristics of a "reference." See ss. 22, 23, 24 and 25, c. 45, R. S. 1843. It was "in a suit pending in Court, where the parties had accounts to produce," and it "referred the investigation of all accounts in issue between the parties," "by rule of Court," to the three individuals "mutually chosen by them, in open Court." These were the substantial and effective parts of the agreement and rule, and must decide their

character. The employment of the words "award" and "arbitrator," cannot vary the legal construction of the rule. See *Cones* v. *Vanosdol*, *ante*, p. 248.

The plaintiff also insists, that conceding this to have been a "reference," the Court still erred, because the record shows that it had been filed in vacation, and not in open Court, as required by the agreement of the parties. This objection was not made below, and is now started here for the first time. It is too late. The plaintiff was present in Court when the report was ordered to be entered of record. He could then have interposed the objection, and opposed its being entered. If made then, the other party might have had it in his power to procure the attendance of the referees, and have had the report filed in open Court, in formal compliance with the terms of the agreement.

Having failed to raise the objection at the proper time, he must be regarded as having waived it.

Per Curiam.—The judgment is affirmed with costs.

J. S. Watts, for the plaintiff.

G. G. Dunn, for the defendant.

THE RUSHVILLE AND SHELBYVILLE RAILROAD COMPANY *v.* MCMANUS.

Where it seems by a statement in the record that a demurrer was filed and sustained to a pleading, but the demurrer itself does not appear, no question can arise upon it on error.

In a suit to recover the amounts of an engineer's estimates for work done for a railroad company, the declaration left the amounts blank, and the Court allowed the plaintiff to supply the blanks by inserting the amounts. The defendant having applied for a continuance without

May Term, 1853.

RUSHVILLE AND SHELBYVILLE RAILROAD CO. v. MCMANUS.

showing that he was prejudiced by the amendment, *held*, that the continuance was properly refused.

Where several facts must be proved to maintain the issue, the Court must admit any legitimate evidence, whenever offered, tending to establish either fact.

If the party adducing such evidence does not also adduce evidence tending to establish the other facts, the Court should, when requested, instruct the jury to disregard the evidence as to that fact.

Where the bill of exceptions does not profess to contain all the evidence, the Supreme Court will presume that all the testimony necessary to sustain the verdict was adduced.

Monday, June 13.

ERROR to the *Rush* Circuit Court.

ROACHE, J.—This was an action of debt brought by *Terence McManus* against the plaintiffs.

The declaration contains the common counts for work and labor, and two special counts on a contract under seal between the parties.

The contract set out, was an undertaking by *McManus* to do certain work on the railroad of the defendants, on terms and at prices therein specified. It was provided that the work should be done under the supervision and direction of the engineer or agent of the company; that if any extra work, the price of which was not fixed by the agreement, should be performed by the direction of such engineer or agent, it should be paid for at a fair and reasonable price, to be determined by such engineer or agent, after a full examination of the circumstances under which such work should have been performed; that during the progress of the work, the engineer should, from time to time, as often as the board of directors should deem necessary, make estimates of the amount of work done, and of the relative value thereof, according to the stipulations of the agreement, and should make out a certificate of such estimates, on presentation of which to the company, an order should be issued, reserving 10 per cent. thereof until the completion of the work; and that when the work was finished, the company would pay the sum which the engineer or agent having charge of the line, should estimate to be due agreeably to the terms of the contract, within ten days after notice in writ-

ing should be given them by such engineer or agent that said work was completed. It was further agreed that the estimate and certificate of the engineer should be final and conclusive between the parties. This is all of the contract necessary to be stated.

It was averred that the plaintiff had performed the work, and that the same had been estimated by the engineer of the company, and duly certified, according to the stipulations of the agreement.

There seems to have been a demurrer filed and sustained to the declaration; but as no demurrer appears in the record, no question can arise upon it here.

The record does show, however, that upon leave of the Court, the plaintiff amended the two special counts, by inserting at the proper places, the amounts of the engineer's estimates, which had been left blank, as follows, to-wit, the sum of 4,931 dollars and 36 cents. Upon the making of this amendment, the defendants moved the Court to continue the cause to the next term. The motion was overruled.

The defendants filed thirteen pleas, all resulting in issues of fact. The fourth plea to the first special count, and the tenth to the second count, denied that the engineer of the company had estimated the work performed and furnished certificates thereof to the defendant, as averred in the declaration.

No question arises upon any other of the pleas, and they are therefore omitted.

The cause was submitted to a jury, who found a verdict for 1,100 dollars in favor of the plaintiff. Motions for a new trial and in arrest of judgment overruled, and judgment on the verdict.

On the trial, after the introduction of the agreement declared on, the plaintiff read in evidence, without exception, an estimate of work performed by him, made by *J. H. Sprague*, the engineer of the company. He then offered to read to the jury, in support of the second special count, another estimate, all the items of which were embraced in the estimate previously read, except the last,

May Term, 1853.

RUSHVILLE AND SHELBYVILLE RAILROAD CO. v. MCMANUS.

which was in these words: "Amount allowed *McManus* on section No. 1, for extra work, and reported to the board, in stock, $600.00." Upon introducing this estimate, the plaintiff proved that it was made by the said *J. H. Sprague*, who, at the date of its execution and during the performance of the said work, was the engineer of the defendant; but without, previously to his offer to read it, making any proof that said estimate had been certified to said defendant, or any notice of its existence given to the defendant, except so far as its contents were embraced in the estimate already given in evidence.

The defendant thereupon objected to the admission of the document, but the Court overruled the objection, and permitted it to be read to the jury.

Two grounds are assigned by the plaintiffs in error for the reversal of this judgment.

1. The refusal of the Court to continue the cause to the next term, on account of the amendment of the declaration.

The plaintiff in error insists that the amendment was a material one, and entitled him to a continuance as a matter of course. In this we think he is mistaken. The defendant was fully apprised by the declaration of all the material facts constituting the cause of action. The contract was set out at length, and it was averred that the plaintiff had performed all the work; that the engineer of the company had made his estimate and duly certified the same to the defendant, in compliance with the terms of the contract; but the declaration omitted to insert the amount of such estimate. It was, therefore, only a question as to filling a blank. It certainly presents no stronger case for a continuance than the alteration of a pleading to make it correspond, as to dates and sums, with "the record, document, or written instrument," adduced on the trial in support of such pleading. Such amendments are not cause of continuance, unless it is made to appear that they will operate to the prejudice of the party in the conduct of his defence. The record does not show that

the defendant in any way offered to show that this amendment would have any such effect.

The ruling of the Circuit Court was correct. See *Nimmon* v. *Worthington*, 1 Ind. R. 376.

2. It is alleged that the Court erred in allowing the introduction of the second estimate offered to be read, without requiring previous proof of its having been certified by the engineer to the defendant, according to the provisions of the contract.

It was necessary for the plaintiff, in order to establish the defendant's liability, to prove both facts, the estimate and the certificate. But he had the right to adopt his own course as to which fact he would prove first. It was the duty of the Court to admit any legitimate evidence, whenever offered, tending to establish either fact. The evidence was under the issue, being the very evidence agreed on by the parties as conclusive between them. See *Forsyth* v. *Ganson*, 5 Wend. R. 558.—*Stephenson* v. *Doe*, 8 Blackf. 508.—*Throgmorton* v. *Davis*, 4 *id.* 174. It is clear, therefore, that it was properly permitted by the Court to go to the jury. Of itself, however, it was not sufficient. If the plaintiff had failed to make out the other link, the certificate, the Court should have been called on to instruct the jury to disregard the evidence, as incomplete. The bill of exceptions does not profess to contain all the evidence given in the case, and we presume, therefore, that all the testimony necessary to sustain the verdict was adduced.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

J. S. Newman, *R. S. Cox*, and *A. W. Hubbard*, for the plaintiffs.

S. W. Parker, for the defendant.

May Term, 1853.

DICKERSON v. NELSON.

THE STATE v. DUNN.

ERROR to the *Marion* Circuit Court.

Monday, June 13.

STUART, J.—This was an indictment for retailing spirituous liquors without license. Motion to quash sustained.

We are not advised what objection to the indictment was made in that Court. Nor, on examination, can we see any serious objection to it. We think the motion to quash should have been overruled.

Per Curiam.—The judgment is reversed with costs.

D. S. Gooding, for the state.

H. O'Neal, for the defendant.

DICKERSON v. NELSON and Another.

The term, "land-office certificate of purchase," as used in s. 8, c. 29, R. S. 1843, applies to certificates from the *U. S.* land-offices; and the term "land-office receipts of final payment," as used in that section, relates to our system of canal lands, *Michigan* road lands, and others sold on credit.

Monday, June 13.

ERROR to the *Allen* Circuit Court.

STUART, J.—Petition for a rehearing.

When this case was before us in the first instance, (1) we were not advised upon what grounds the Court below had dissolved the injunction. We had, therefore, to suppose what they were, and to prevent further litigation, decide accordingly.

The question was directly made by counsel whether *Nelson's* judgment was a lien on the land, and we decided that it was not; and we are still satisfied with that decision.

The following remarks in the original decision were

suppressed, because the question was deemed too plain for argument, viz.:

"In support of *Nelson's* position, the R. S. 1843, c. 29, ss. 1, 8 and 9, are referred to. The first section cited enumerates the classes or kinds of lands subject to execution. The 8th and 9th sections make land-office certificates of purchase, and land-office receipts of final payment before patent issued, evidence of legal title and subject to execution, like any other real estate. There are several qualifications which, for the purposes of this case, it is not necessary to notice. Reference is also made to the act of 1833, p. 112, as though the statute of 1843 had changed the law. But the 3d section of that act is in the very identical words of the 8th section of the R. S. The 9th section above referred to, declaring such lands subject to execution, is simply announcing a conclusion which the Courts must necessarily have drawn from the terms of the preceding section. These sections 8 and 9 read thus:

" 'SECT. 8. A land-office certificate of purchase, and also a land-office receipt of the final payment of any lands, sold at such land-office, shall, at any time before the issuing of a patent thereon, be evidence that the legal title in and to the lands specified in such certificate or receipt is in the legal and *bona fide* holder thereof; the same being unforfeited and in full force and validity.

" 'SECT. 9. Any lands held on such certificate or receipt shall be subject to execution like any other real estate; and any judgment or decree for the payment of any debt, damages, sum of money, or costs, shall be a lien and charge thereon, as against the *bona fide* holder of such certificate or receipt, from the time of rendering the same, in like manner, and subject to the same provisions as in other cases.'

"We do not see how any of these provisions, taken in connection with the facts, helps *Nelson's* case. There was still part due on the certificates at the time they were assigned to *Dickerson*. In fact, these very certificates were surrendered by him at the land-office at the

May Term, 1853.

DICKERSON v. NELSON.

time he paid out the lands, and "receipts of final payment" were issued to the complainant. Then, for the first time, these lands became subject to execution under the statute, not for the debts of *Castleman*, but for the debts of *Dickerson*, the holder of the receipts of final payment.

"The sections above set out contemplate two kinds of instruments, known to the history of the country, which it is thereby enacted shall be evidence of legal title. The one from the *United States* land-offices, called "certificates of purchase," which seeing there is no partial payment, no credit given, the certificate is itself evidence of final payment, and under the act referred to, is evidence of legal title. This fills the first clause of the 8th section, and necessarily refers to *United States* lands.

"The second kind of instruments referred to, and called in the act "land-office receipts of final payment," as distinguished from "land-office certificates of purchase," relates to our own system of canal lands, *Michigan* road lands, and others sold on credit. Hence, the second clause embraces this class of lands under the term "receipts of final payment." This is the only construction which will make sense and give effect to both clauses. It has the further recommendation of being in consonance with the history of the country, and the judicial history of the state, so far as relates to that question.

"The construction contended for by counsel for *Nelson*, would render the second clause wholly inoperative; for the first clause would necessarily cover all that could have been meant by both. By the second clause, the legislature must have meant something; and it is our duty to give the statute such construction as that both clauses shall be operative, if possible. This is fully effected by applying the first clause to the *United States* lands, and the second to the land system and credit sales of *Indiana*. The *United States* land-office certificate is at once evidence of legal title under the statute, because the only payment made was a final one. The other lands are placed on the same footing so soon as the receipt of

final payment is issued. So that final payment is the great criterion in both cases.

"The ambiguous phrase with which the 8th section concludes can have no weight against the explicit language of the precedent matter. If that phrase cannot be reconciled, it must fall. There could be no lien till after receipt of final payment. And if after final payment there could be no forfeiture, the phrase is inapplicable and void. If there could be a forfeiture after final payment, still the words 'unforfeited,' &c., are but another condition added to that of final payment, which the act makes essential before the lien of a judgment can attach."

For the reason already intimated, this extract was stricken out of the former opinion as originally prepared, and the substance or conclusion given in a single paragraph. On overruling the petition for a rehearing, it is out of the usual course, but, perhaps, not improper, to insert it here, without committing ourselves to follow such a precedent hereafter.

Per Curiam.—The petition for a rehearing is overruled.

(1) See the opinion delivered in this case, *ante*, p. 160.

---

4 283
143 408

Reed and Others, *v.* Coale and Another, Administrators.

In a suit upon a note executed by *A.* to *B.* a note made by *B.* and *C.* to *A.* was set up as a defence by way of set-off, without any allegation applying the latter note to the transaction upon which the former was founded. *Held*, that it was not a proper set-off.

In a suit for foreclosure by the assignee of a mortgage, against *A.*, for the non-payment of his note given to *B.* and secured by the mortgage, *A.* set up in his answer that before notice of the assignment he sold certain specified goods to *B.* and *C.* to whom the note actually belonged, although drawn in favor of *B.*, and that by an agreement with *B.* and *C.*, and

May Term, 1853.

REED v. COALE.

particularly with the consent and acquiescence of *B.*, the goods were accepted for and on account of said note. *Held*, that the defence alleged was sufficient.

A mortgage not acknowledged or proved, cannot, under the R. S. 1843, be properly admitted to record.

The recording of an instrument operates as constructive notice of its contents only in those cases where the recording is authorized by law.

The R. S. 1843 do not authorize the recording of the assignment of a mortgage.

The surrender of a note to the maker is a good consideration, to the extent of the amount due on it, for a new note given in its stead.

The new note is a new contract, to be regarded as if given for any other valid consideration, and to be governed in all respects by the law in force at the date of its execution.

Section 29, c. 31, R. S. 1843, is retrospective, and revives contracts which were, by the previous act, void for usury.

But the payee of a usurious note, under the law of 1843 can only recover the principal, without interest, and if any interest has been paid, it is deducted from the principal, and judgment rendered for the residue; and the defendant recovers his costs.

To constitute usury, two things are necessary: 1. A loan, and 2. The taking of more interest than the law allows; and where these facts are shown to exist, the law pronounces the intent to have been corrupt.

In a civil case, evidence is not admissible to show that the party contracting for usurious interest had no corrupt purpose in taking it.

Wednesday, June 15.

ERROR to the *Wayne* Circuit Court.

ROACHE, J.—This was a bill in chancery for the foreclosure of a mortgage, brought by the defendants in error against *Irvin Reed* and others, heirs of *Edmund Evans*, deceased. The Circuit Court rendered a decree in favor of the complainants for the sum of 1,450 dollars, and, in default of payment, ordered a sale of the mortgaged premises.

The facts alleged in the bill are substantially these:

In 1836 or 1837, *Samuel Coale* lent to *Edmund Evans* 1,000 dollars, and a note was executed, payable in one year, with interest at the rate of 10 per cent. The interest was regularly paid up to *February* 29th, 1842, and indorsed on the note. On the 20th day of *October*, 1842, the note was surrendered and a new one under seal executed, of the precise tenor of the original, excepting the date, which was correctly stated. The reason assigned for making the new note is, that the original was covered

with indorsements, and that they were advised and believed that it would be lawful, and that, under the circumstances, the change would not in any way affect the rights of the parties or change the nature of the debt. The interest was regularly paid on the new note for four and a half years, amounting to 450 dollars.

On the 12th day of *March*, 1842, *Irvin Reed*, the husband of *Mary*, a daughter of *Edmund Evans*, deceased, executed two instruments, in the form of title-bonds, with conditions of defeasance, for the purpose of securing the payment of two promissory notes, of 1,000 dollars each, payable *March* 12th, 1843, to the said *Edmund Evans*, on lot No. 97, in the city of *Richmond*.

On the 20th day of *October*, 1842, *Evans* assigned one of these "mortgages" to *Coale*, as collateral security upon his note, setting out in the assignment that as the said *Evans* held another mortgage on *Reed*, of the same date and amount, which was not transferred, "the within mortgage should have priority of satisfaction out of the property on which both of said mortgages are, they both being on the same property." This assignment was acknowledged by *Evans*, and the instrument and assignment were recorded *November* 2d, 1842.

Edmund Evans died intestate *March* 1st, 1846, leaving the plaintiffs in error his heirs at law.

None of the defendants answered except *Reed*.

Reed, in his answer, admits generally the material allegations in the bill, except that he denies all notice of the assignment of the mortgage by *Evans* to *Coale*, until after the death of the latter. He insists that the recording of the assignment of the mortgage did not operate as notice to him, not being authorized by the statute.

He further alleges that the note for 1,000 dollars, given by *Evans* to *Coale*, was usurious, and claims that the several sums paid and credited on the note as interest, shall be applied as a credit on the principal.

He also claims to be entitled to a set-off against the whole amount of the note. He alleges that the note was given in consideration of a sale of goods made to him by

May Term, 1853.

REED v. COALE.

the said *Edmund Evans* and *John Evans*, who were, at the time, partners, trading under the name of *E. Evans & Son*, and that it was consequently, although only in the name of *E. Evans*, the property of the firm. He then sets up several items of set-off against the notes:

1. Three several promissory notes, given by *E. Evans & Son* to him, all of dates subsequent to the date of the note in controversy, and amounting together to over 1,300 dollars; but there is no further allegation in any way connecting said notes with the transaction between *Reed* and *E. Evans*. 2. A bill of goods, wares and merchandise, amounting to 2,450 dollars, which he alleges were sold by him to *E. Evans & Son*, in 1844, "and which were accepted by them, by the consent and acquiescence of said *Edmund Evans*, on account of said two agreements, (one of which is the 'mortgage' sued on) specified in said bill, and were to be accounted for by said *Edmund Evans* in settlement on account of said agreements."

The complainant excepted to all that portion of the answer alleging a set-off. The Court sustained the exception as to the item of goods sold, and reserved their decision as to the item of promissory notes, until final decree.

The Court, on the hearing, rendered a decree for the full amount of the note, with 10 per cent. interest, disallowing the promissory notes as an offset.

The three notes embraced in the first item, were not proper subjects of set-off. They were payable to *E. Evans & Son*, and not to *E. Evans* alone, and therefore wanted the essential quality of mutuality, and there are no allegations in any way applying them to the notes of *Reed* to *E. Evans*.

We are of opinion that the Court erred in sustaining the exception as to the item of goods sold. The allegations as to that item are, substantially, that before notice of the assignment he sold the goods to *E. Evans & Son*, to whom the note actually belonged, although drawn in favor of *E. Evans* alone; and that, by an agreement with both the partners, and particularly with the consent and

acquiescence of *E. Evans*, the payee, the goods, &c., were accepted for and on account of said notes.

There can be no doubt but that these facts would have constituted a valid set-off in a suit by *E. Evans* on the note. If good as against *Evans*, it is equally good against his assignee, if made before notice of the assignment. The complainant contends that the recording of the assignment operated as a constructive notice to *Reed*, and insists that inasmuch as the answer admits that it was so recorded sometime previous to the date of the set-off, he cannot, in the same answer, be permitted to dispute its legal effect.

The mortgage was not acknowledged, nor proved, and could not, therefore, under the statute, be properly admitted to record. Indeed, it is wholly immaterial, so far as this point is concerned, whether it was recorded or not. It was binding on *Reed* without recording. But the transfer of the mortgage was the fact with notice of which *Reed* is sought to be charged. There was no law authorizing the recording of assignments. The recording of an instrument operates as constructive notice of its contents only in those cases where such recording is authorized by law.

We are of opinion, therefore, that the record of the assignment was not notice to *Reed*, and that it was, consequently, competent for him to set up the second item as an offset. The exception to that portion of the answer should have been overruled.

It remains to consider the question of usury.

The law in force at the date of the original note, permitted the taking of 10 per cent. That law was repealed by the act of 1842, (General Laws 1842, p. 91, s. 8,) which was in force for several months before the new note was executed. The surrender of the original note was a good consideration, to the extent of the amount due on it, for the new note. But the new note was a new contract, and is to be regarded as if given for any other valid consideration, as the sale of goods or the like. It was to be governed, in all respects, by the law in force at the date of its execution. By that law it was usurious and void. But

May Term, 1853.

REED v. COALE.

the case is embraced by the provisions of the act of 1843, (R. S. 1843, p. 581, s. 29,) which is retrospective in its operation, and revives contracts which were, by the previous act, void. See *Andrews* v. *Russell*, 7 Blackf. 474. The payee of the usurious note, under this law, can only recover the principal, without interest; and if any interest shall have been paid, it shall be deducted from the principal, and judgment rendered for the residue; and the defendant recovers his costs.

The counsel of the appellees insists that inasmuch as the evidence shows that the taking of the new note was in good faith, and was, as the parties supposed, merely a continuation of a pre-existing valid contract, it is not subject to the taint and penalty of usury. In other words, that although the presumption of usury arises wherever the taking of unlawful interest is shown, yet that presumption may be rebutted by proving the party to have had no corrupt purpose in taking it. In this he is mistaken.

Two things are necessary to constitute usury. 1. A loan, 2. The taking of more interest than the law allows. *Scott* v. *Lloyd*, 9 Peters 418. Wherever these two facts are shown to exist, the law pronounces the intent with which they were done to be corrupt. Parties frequently seek to evade the statute by various devices, as by pretended sales, and the like. In such cases it becomes material to inquire what was the real character of the transaction. If it be ascertained that the party intended, by the pretence used, to take more than the legal rate of interest, that intent is declared corrupt. It is a presumption of law, which cannot be rebutted by any proof of honest intentions. A man might as well be allowed to show that he had violated any other positive statute with a good design. In a criminal prosecution such proof might have weight in mitigating the punishment; but in a civil case, where it is sought to be used to affect the rights of the other party, accruing under a positive statute, it is wholly inadmissible.

The statute governing this case expressly prohibited

the taking of more than 6 per cent. interest. The note was made since the enactment of that statute, which the party is presumed to have been aware of. It follows then that the party contracted to take illegal interest, intending, as the law presumes, in so doing, to violate the statute. The consequences of his acts are fixed by the statute.

Per Curiam.—The decree is reversed back to the order of the Court sustaining the second exception of the complainant to the answer of the defendant *Reed*, with costs. Cause remanded for further proceedings in accordance with this opinion.

J. S. Newman, for the plaintiffs.

J. Perry, for the defendants.

BURTON *v.* COCHRAN and Another.

Assumpsit by the assignees of an accepted bill of exchange against the acceptors. Pleas, the general issue, fraud, and want of consideration. General demurrers to the pleas of fraud and want of consideration. The entry following upon the record was—the cause is submitted to the Court for trial without the intervention of a jury, and, the evidence being heard, &c., the Court find for the plaintiffs, &c. *Held*, that it must be presumed that the issues of law and fact were submitted together to the Court for trial, and that they all were found for the plaintiffs.

Where the general issue and special pleas are filed to the action, and the defence set up in the special pleas is admissible under the general issue, it is immaterial whether a demurrer to the special pleas is sustained or overruled.

ERROR to the *Vigo* Circuit Court.

Wednesday, June 15.

Per Curiam.—Assumpsit by the assignees of an accepted bill of exchange against the acceptors. Pleas, the general issue, fraud, and want of consideration. General demurrers to the pleas of fraud and want of consideration.

May Term, 1853.

COOPER v. MCJUNKIN.

The entry following upon the record is, that, by the agreement of the parties, the cause is submitted to the Court for trial, without the intervention of a jury, and, the evidence being heard, &c., the Court find for the plaintiffs, &c.

It is insisted upon for error that there was a final judgment for the plaintiffs while issues of law remained undisposed of. But upon the record it must be taken that the issues of law and fact were submitted together to the Court for trial, and that they were all found for the plaintiffs below. And we may remark, that it is immaterial whether the issues of law were decided rightly or not, as the matter of defence set up in the pleas, if available at all in the case, was admissible in evidence under the general issue.

The evidence given in the cause under the general issue is not upon the record.

The judgment below is affirmed with 5 per cent. damages and costs.

J. P. Usher, for the plaintiff.

COOPER *v.* MCJUNKIN.

Trespass. The first count in the declaration was in the usual form for an assault and battery. The second alleged that the defendant unlawfully, and with inhuman violence, beat, bruised, cut and gashed the face and head of the defendant, &c. Plea, that the several trespasses in the first and second counts mentioned (which were enumerated in the plea) were one and the same, &c.; that the relation of teacher and pupil subsisted between the parties; that at, &c., in school and during school hours, the plaintiff, as such pupil, was negligent, disorderly, &c., and that the defendant, as such teacher, finding it necessary for the good government of the school, did thereupon moderately correct the plaintiff, as he lawfully might, &c., averring that this moderate correction constituted the several acts of trespass in the declaration mentioned, and in the introductory part of the plea enumerated, &c. *Held*, that the plea was not a good answer to the second count, and the replication to it having been demurred to, that the plea was reached by the demurrer.

A bad replication is sufficient for a bad plea.

A teacher, in the exercise of the power of corporal punishment, must not make such power a pretext for cruelty and oppression; but the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, should be distinguished with the kindness, prudence, and propriety which become the station.

Wednesday, June 15.

ERROR to the *Allen* Circuit Court.

STUART, J.—*Cooper* sued *McJunkin* in trespass.

The first count is in the usual form for an assault and battery. The second count alleges that *McJunkin* unlawfully, and with inhuman violence, beat, bruised, cut and gashed the face and head of *Cooper*, &c.

The defendant filed several pleas, none of which are now before us, except the fourth plea.

In the introductory part that plea enumerates the several trespasses in the first and second counts, and avers that they are one and the same acts of trespass. The pleader then states that the relation of teacher and pupil subsisted; that at, &c., in school and during school hours, *Cooper*, as such pupil, was negligent, disorderly, &c.; that *McJunkin*, as such teacher, finding it necessary for the good government of the school, did thereupon moderately correct *Cooper*, as he lawfully might, for the cause aforesaid, averring that this moderate correction constitutes the several acts of trespass in the declaration mentioned, and in the introductory part of the plea enumerated, &c.

The replication, admitting the bad conduct of *Cooper*, is a species of *de injuria*, to which a demurrer was sustained, and judgment for the defendant. The replication is informal—perhaps bad; but it is good enough for a bad plea.

The law still tolerates corporal punishment in the school-room. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the government of schools which has been discarded everywhere else. Whether such training be congenial to our institutions and favorable to the full development of the future man, is worthy of serious consideration, though not for us to discuss.

May Term, 1853.

COOPER v. MCJUNKIN.

In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. Where one or two stripes only were at first intended, several usually follow, each increasing in vigor as the act of striking inflames the passions. This is a matter of daily observation and experience. Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly. The tender age of the sufferers forbids that its slightest abuses should be tolerated. So long as the power to punish corporeally in school exists, it needs to be put under wholesome restriction. Teachers should, therefore, understand that whenever correction is administered in anger or insolence, or in any other manner than in moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law "*in loco parentis*"—*in the sacred relation of parent*—the Courts must consider them guilty of assault and battery, the more aggravated and wanton in proportion to the tender years and dependent position of the pupil.

Were it within the province of these discussions, how many other objections to the rod, based upon its injurious moral influence on both teacher and pupil, might be safely assumed.

One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself.

It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the re-

sources of his intellect and heart. Such is the only policy worthy of the state, and of her otherwise enlightened and liberal institutions. It is the policy of progress. The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained. It is regretted that such are the authorities,—still courts are bound by them. All that can be done, without the aid of legislation, is to hold every case strictly within the rule; and if the correction be in anger, or in any other respect immoderately or improperly administered, to hold the unworthy perpetrator guilty of assault and battery.

The plea before us avers that the several acts of trespass alleged in both counts were one and the same act. This mode of pleading, the effect of which is to deprive the plaintiff of the benefit of several counts on the trial, is, when taken in time, bad on general demurrer. But, by replying, the plaintiff has cured the defect and narrowed his own position. 1 Chitty Pl. 414.—7 Blackf. 384.

The plea assumes to answer the whole declaration. Moderate correction, supposing it an answer to the first count, is not a sufficient answer to the matter alleged in the second count. 7 Blackf. 74.—17 Ohio R. 454. If the inhuman beating, cutting, &c., alleged in the second count did not take place, the defendant, as to that, should have pleaded the general issue, and justified as to the residue. If he committed the alleged violence, he could only justify by showing its necessity; for example, to overcome resistance offered to the legitimate exercise of his authority. The plea before us does neither.

The acts of cruelty complained of in the second count are, therefore, not embraced in the idea of moderate correction. Admitting the right to chastise moderately, it does not follow that a choleric schoolmaster will be justified in beating and cutting the head and face of a way-

May Term, 1853.

Hood v. Dinwiddie.

ward boy with any weapons which his passions may supply. To call such acts of extreme violence moderate correction, does not change their character. It is not a denial of the allegations in the second count, nor does it confess and avoid them. Such pleading, professing to answer the whole declaration, is bad on demurrer; and was reached by the demurrer to the replication.

The law having elevated the teacher to the place of the parent, if he is still to sustain that sacred relation, "it becomes him to be careful in the exercise of his authority, and not make his power a pretext for cruelty and oppression." 14 Johns. R. 119. Whenever he undertakes to exercise it, the cause must be sufficient, the instrument suitable to the purpose; the manner and extent of the correction, the part of the person to which it is applied, the temper in which it is inflicted, all should be distinguished with the kindness, prudence, and propriety which become the station.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

H. Cooper, for the plaintiff.

J. W. Dawson and *M. Jenkinson*, for the defendant.

Hood and Others *v.* Dinwiddie and Others.

Motion to re-instate a cause upon the docket of the Supreme Court. The cause having been continued for two terms successively under the general order, was, at the next term, regularly called for trial, and, the plaintiffs failing to appear, was dismissed, at the instance of the defendants, under rule 19, governing the practice of the Court, which prescribes that "if, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed," &c. At a subsequent day of the same term, on motion of the plaintiffs' counsel, a rule was granted, and served on the defendants' counsel, to show cause why the case should not be re-instated, &c. The only ground for re-instating the cause was contained in an affidavit of the plaintiffs' counsel, alleging that he was

necessarily absent on the calling of the cause; that it was dismissed for want of prosecution; and that he believed there were merits in the cause, and that justice required its re-instatement. *Held*, that no sufficient reason was shown for granting the motion.

Where, however, at the calling and dismissal of a cause, the plaintiff is temporarily out of the court-room but returns immediately and asks its re-instatement, the Court would direct the entry of dismission to be stricken out.

MOTION to re-instate a cause on the docket.

Wednesday, June 15.

Per Curiam.—This case was filed in this Court as a writ of error on the 13th of *March*, 1852, and a summons was duly issued, requiring the defendants in error to appear, &c.

At the *May* term following, and also at the *November* term, 1852, the case was continued under the general order. On the 4th day of the present term, (*May*, 1853,) it was regularly called for trial, and the plaintiffs failing to appear, was dismissed on the requisition of the defendants, under rule 19, governing the practice in this Court. (1)

On a subsequent day of the term, the plaintiffs' counsel moved that the case be re-instated upon the docket. A rule was granted and served upon the defendants, requiring them to show cause, &c.

The defendants appeared and answered to the rule, and insisted that the case was dismissed in the regular practice of the Court, and that the plaintiffs had shown no valid ground on which to sustain their motion to re-instate; and of this opinion is the Court.

The only ground taken is presented in the following affidavit:

"Personally appeared, in open Court, *James Rariden*, the plaintiffs' attorney in the above case, and said that he was necessarily absent on the calling of the above cause, and that the same was dismissed for want of prosecution. He said he believed there were merits in the cause, and that he thought that justice required that it should be re-instated."

It is very manifest that no legal excuse is set forth in this affidavit for neglecting, during the whole sitting of

May Term, 1853.

Hood v. Dinwiddie.

the Court on the day on which the case was dismissed, to answer to it as having been called; and that to re-instate it upon such an affidavit, would set a precedent rendering nugatory the rule under which the dismission was had. We are satisfied, also, that to do so would be encouraging a carelessness in practice that would tend much to retard the progress of business.

Had the party been temporarily out of the court-room when the case was called and dismissed, but returned immediately and asked that it should be re-instated, the Court would undoubtedly have directed the entry of dismission to be stricken out. This, however, was not the state of the facts in the case before us.

The rule to show cause must be discharged, and the motion to re-instate must be overruled, at the cost of the plaintiffs in error.

(1). That rule is as follows: If, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed, or may submit it either with or without argument. If the defendant make default, the plaintiff may proceed *ex parte*.

END OF MAY TERM, 1853.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1853, IN THE THIRTY-EIGHTH YEAR OF THE STATE.

PERRY and Others *v.* BLAND and Others.

Bill under art. 3, c. 30, R. S. 1843, to contest the validity and prevent the probate of a writing offered to be proved as a will. An issue was made up in the form prescribed by s. 60 of said article, except that the words, "the execution of the same being admitted," were added. *Held*, that the defendants still had the right to open and close the argument to the jury. *Held*, also, that the defendants, by allowing the plaintiffs, as they did, to introduce their evidence first before the jury, did not waive that right.

Monday, November 28.

APPEAL from the *Union* Probate Court.

ROACHE, J.—This was a proceeding instituted under the provisions of art. 3, c. 30, R. S. 1843, by the appellants, to contest the validity and prevent the probate of an instrument offered to be proved as the last will and testament of *James Snowden*.

The appellants, having first filed a caveat, filed a bill alleging for objections against the admission of the writing offered to probate, that the decedent, at the time of

Nov. Term, 1853.

PERRY v. BLAND.

its execution, was of unsound mind, and that it was procured to be made by the false and fraudulent representations of the defendant, *Emily Bland*. Answers were put in by the defendants denying the incompetency of the testator, and the improper influences alleged.

An issue was made up, in pursuance of the provisions of section 60 of the same chapter above cited. The jury to which it was submitted for trial, found that the writing produced was the last will and testament of *James Snowden*.

The evidence is not set out. A bill of exceptions was taken, during the progress of the trial, to a ruling of the Court, which embraces the only error complained of. It shows that at the trial the appellants proceeded, without objection on the part of the defendants, to introduce their evidence to sustain their objections to the probate of the will. They were followed by the introduction of testimony on the part of the defendants, sustaining the competency of the testator, and rebutting the charge of fraud in procuring its execution. After the evidence was closed on both sides, the Court, on motion of the defendants, permitted them to open and close the argument to the jury.

This ruling of the Court is the only error assigned.

The appellants insist that the rule prescribed by section 60 above cited, is changed in the present case by the form of the issue. The issue made up is in the precise form required in that section, except that there is added to it these words: "the execution of the same being admitted." They contend that inasmuch as the execution of the will was admitted, it left them to sustain the affirmative upon the issue as to incompetency and fraud, and that as the issue thus threw upon them the affirmative, they were entitled to open and close the argument, according to the rule in other cases.

This would be true if the statute did not prescribe a rule. Section 56, of the same chapter, provides that it may be objected, by allegations in writing, against the admission of a will to probate, either that the testator

was idiotic or of unsound mind, or that the will was not duly executed, or that the same was executed under duress or restraint, or obtained by fraud, or that any other valid objection exists. Section 60 enacts that in such proceedings an issue shall be made up whether the writing produced be the last will and testament of the testator; "and upon this issue, the defendants in such proceedings shall have the affirmative."

The language of the statute is imperative, and embraces all cases arising under it where any one of the objections specified is alleged, and there is no exception made.

It is contended, however, that inasmuch as the appellants were permitted to introduce their evidence first before the jury, without objection, the defendants were precluded from claiming their right to open and close the argument. We do not think so. The waiver of their right to introduce their evidence, certainly was no waiver of the right the statute gives them of opening the argument. They might, if they chose, have introduced no evidence at all. This certainly would not have precluded them from commenting on the appellants' evidence, and in the order prescribed by the statute.

Per Curiam.—The decree is affirmed with costs.

J. Perry, for the appellants.

J. Yaryan, for the appellees.

The State *v.* O'Conner.

The act of 1851 to regulate the sale of spirituous liquors in *Tippecanoe* county, was not repealed by the new constitution.

Section 7 of that act does not create a distinct offence from that created by section 5 of the same act, but only prescribes a new rule of evidence upon trials for the offence defined by the latter section.

Nov. Term, 1853

THE STATE v. O'CONNER.

A defendant on trial for a misdemeanor may show in his defence that he has been tried and convicted for the same offence.

If evidence offered constitutes a link in the chain of evidence which is admissible, it should be admitted.

Monday, November 28.

APPEAL from the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—An information was filed against *O'Conner*, in the *Tippecanoe* Court of Common Pleas, for retailing without license.

The information, which contained two counts, was founded on the provisions of an act entitled, "An act to regulate the sale of spirituous liquors in the county of *Tippecanoe*," approved *February* 13, 1851. (1)

The fifth section of that act provides, that should any person directly or indirectly sell or barter any spirituous liquors by a less quantity than one quart at a time in said county, &c., without a license so to do, &c., such offender shall forfeit and pay, &c.

Section 7 is in these words: "In all prosecutions under this law, proof that the defendant is the keeper of a grocery or tavern, and to all appearances engaged in retailing liquors by a less quantity than one quart at a time, shall be sufficient to produce a conviction."

The first count is founded on the fifth section, and alleges that the defendant did sell by a less quantity than a quart at a time, to-wit, one pint, to a person unknown. The second count is in the language of the seventh section, and charges that the defendant was, to all appearances, the keeper of a certain grocery for the sale and retail of spirituous liquors by a less quantity than one quart at a time, he, the said defendant, not being licensed to retail.

The Court quashed the second count of the indictment, on the ground, as is alleged, that the statute on which it was based, being local to the county of *Tippecanoe*, was abrogated by the constitution adopted in 1851. On this ground, if no other existed, the decision would have been erroneous. See *The State* v. *Barbee*, 3 Ind. R. 258.

But the count is clearly bad for another reason. The seventh section of the act on which it is founded, does

not, as the prosecutor seems to have supposed, create a distinct offence; it only prescribes a new rule of evidence applicable on trials for the offence defined in the fifth section.

The cause was submitted to the Court for trial, and the defendant was acquitted.

On the trial, the defendant offered in evidence a record of a trial and conviction in a previous case in the same Court, on an information against him, for retailing to certain persons whose names were unknown. The evidence was correctly admitted. The defendant had a right to show that he was on his trial for an offence for which he had already been tried and convicted. Both the former and pending informations charged him with retailing to persons unknown. The record was not of itself, perhaps, sufficient, but was one link in the chain of evidence to prove that the offences were, in point of fact, the same. He had a right to introduce it, and follow it with the necessary proof showing them to be identical. For this purpose, the evidence was properly admitted.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

D. Mace and *W. C. Wilson*, for the defendant.

(1) See Gen. Laws 1851, p. 121.

YOUNG and Others *v.* THE STATE BANK.

4 301
159 278

Where, in the absence of a party, the Court has improperly allowed the record to be amended by noting the filing of pleadings by his adversary, the proper remedy is by motion, in the same Court, to have the amendment set aside.

A judgment by *nil dicit*, where pleas remain undisposed of, is erroneous.

The legislature has not the power to grant a new trial of a suit at law.

May Term, 1853.

YOUNG v. THE STATE BANK.

Monday, November 28.

ERROR to the *Owen* Circuit Court.

PERKINS, J.—Assumpsit by the *State Bank* for the use of the branch at *Terre Haute*, against *John Young* and others, upon a promissory note payable at said branch. Judgment below for the plaintiff, *September*, 1841.

In 1845 the legislature of the state passed an act granting a new trial. The Circuit Court held said act unconstitutional, and refused to hear the new trial. Before considering this point, another will be noticed.

The judgment in the case upon the trial had, was entered as one by *nil dicit*, no defence appearing to have been interposed. Subsequently the record was amended, on the motion of the defendants, in the absence of the plaintiff, so as to show that the plea of the general issue and several special pleas were filed, upon which issues at law were formed. It is objected that said amendment was illegally made. This objection has already been answered. When this cause was before us upon the chancery side of the Court, it was decided that the Court below had power to make the amendment. See the case of *The State Bank* v. *Young et al.*, 2 Ind. R. 171. It is there laid down that, "what the bill says as to the entry made in the record relative to the filing of the pleas, is not material. The pleas were on file among the papers in the cause, but the clerk had omitted to make an entry of their being filed. The Court of law, surely, could have that misprision amended at any time when proper application was made. If the amendment was objectionable for the want of notice to the bank of the motion, as is insisted upon by her counsel, she should have applied to the Court of law, on that ground, to set the amendment aside."

No such application appears to have been made, and the pleas must, therefore, be considered a part of the record of the cause. This being the case, the judgment by *nil dicit*, those pleas being undisposed of, was clearly erroneous, and must, for this cause, be reversed. *Tipton* v. *Cummins*, 5 Blackf. 571.—*Maddox* v. *Pulliam*, *id.* 205.

We now return to the point passed by, though it has become immaterial in the case.

The Circuit Court did right in refusing to hear the new trial granted by the special act of the legislature. The legislature does not possess the power to grant a new trial in a suit at law. The constitution of *Indiana* has always contained the following provision:

"The powers of the government of *Indiana* shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." (1)

There is no section of the constitution permitting the legislature to grant new trials.

The granting of a new trial is a judicial act, and, in this state, controlled by settled rules of law. If an inferior Court should, in any given case, exercise the power to grant new trials, in violation of these settled rules, this Court would set aside the grant, and leave the judgment rendered unaffected.

Now, the constitution above quoted says the legislature shall not perform a judicial act. The granting of a new trial, we have seen, is a judicial act. Therefore, the legislature cannot grant a new trial.

And it is a power that should not be possessed by the legislature, in its legislative capacity; because, in that capacity, it would not be governed by legal rules. In governments where the constitution converts the legislature, on some occasions and for some purposes, into a court, while that body is thus acting, it is governed by the same rules, and restrained in its action by the same authorities, as are courts of law. Not so where it acts simply in its legislative capacity; and to permit it to dispose of judicial questions in that capacity, would be in

Nov. Term, 1853.

YOUNG v. THE STATE BANK.

the highest degree dangerous to the rights of the individual members of the community.

It has already been solemnly decided by the highest courts of the *Union*, that the legislature of a state cannot pass appraisement and stay laws that shall embarrass and postpone the collection of debts beyond the time allowed by the law of the contract, on the ground that such legislation impairs the obligation of contracts. But if the legislature may grant new trials, *ad libitum*, it can forever prevent the collection of debts. It could, at pleasure, wipe out every judgment in the state. Possessed of such a power, that of passing stop-laws would not be sought for.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. P. Hester and *D. Wallace*, for the plaintiffs.

A. Kinney and *S. B. Gookins*, for the defendant.

(1) The language quoted is that of article 2 of the constitution of 1816. Article 3 of the constitution of 1851, is as follows: "The powers of the government are divided into three separate departments; the Legislative, the Executive, including the administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this constitution expressly provided."

YOUNG and Others *v.* THE STATE BANK.

Monday, November 28.

ERROR to the *Owen* Circuit Court.

Per Curiam.—The judgment in this case is reversed with costs, for the reasons given in the previous case of the same parties, this day decided, (1) and involving the

same questions. Cause remanded for further proceedings.

C. P. Hester and *D. Wallace*, for the plaintiffs.

A. Kinney and *S. B. Gookins*, for the defendant.

(1) See the next preceding case.

JONES *v.* CAVINS.

An office may exist without any duties attached to it.

The constitution of 1851 imposes no duties upon county auditors, but leaves their duties to be defined by the legislature.

The creation by the constitution of 1851 of the office of county auditor in each county, did not operate to revive the law prescribing the duties of the auditor of *Greene* county, which had previously been repealed.

The constitution of 1851 did not extend the operation of the laws in force at its adoption prescribing the duties of county auditors, beyond the boundaries then limiting them.

It simply declares that those laws shall be in force until they expire by their own limitation or are repealed by the legislature.

The office of county auditor was first created by an act of the legislature of 1841, and the duties pertaining to it, in the counties where it was created, were previously, for the most part, performed by the clerk of the Circuit Court, an officer created by the old and continued by the new constitution. In 1844, an act was passed, abolishing the office of county auditor, in *Greene* county, and restoring the duties then performed by the auditor in that county to the clerk. *Held*, that the clerk, by assuming the discharge of those duties, did not become the holder of two offices.

The law of 1844, which restored to the clerk of *Greene* county the duties which had been transferred from his office to that of the county auditor, was continued in force by the constitution of 1851.

The words "published" and "circulated," in s. 28 of art. 4 of the constitution of 1851, are used synonymously.

That part of s. 28 of art. 4 of the constitution of 1851 which declares that "no act shall take effect until the same shall have been published and circulated in the several counties," &c., means that such act shall not take effect in any county until it has been distributed to all.

Nov. Term, 1853.

JONES v. CAVINS.

The R. S. 1852 did not take effect until they were distributed to all the counties in the state.

They were not distributed to all the counties until the 6th day of *May*, 1853.

Monday, November 28.

APPEAL from the *Greene* Circuit Court.

PERKINS, J.—Information filed in the *Greene* Circuit Court at the *April* term, 1853, under art. 44, vol. 2, of the R. S. of 1852, by *John Jones* against *Samuel R. Cavins*.

The information states that at the general election in *October*, 1852, *John Jones*, the plaintiff, was elected auditor of *Greene* county; that he was subsequently commissioned, gave bond, and in *March*, 1853, was sworn, &c.; that he had demanded the books, &c., pertaining to the office, of *Samuel R. Cavins*, who was in possession of them and was usurping the exercise of the functions of said office, &c., and that *Greene* county contained over 1,000 polls, &c.

Cavins answered, stating that on the first *Monday* of *August*, 1848, he was elected clerk of the Circuit Court of said county for seven years from the 27th day of *April*, 1849, and was afterwards duly qualified, &c., whereby he became vested with the right to discharge the duties the exercise of which he was charged with usurping, inasmuch as the legislature, in 1844, passed an act which had not been repealed, abolishing the office of auditor in *Greene* county and attaching the duties that had pertained thereto, to the office of clerk in said county.

Demurrer to this answer overruled, and final judgment for the defendant, *Cavins*.

The question going to the merits of the case is, whether the local law under which *Cavins* was discharging a portion of the duties of his office as clerk, was continued in force by the constitution of 1851.

It will aid us in understanding it to glance a little backward in beginning our investigation.

The office of county auditor was not known to the former constitution of *Indiana;* nor was it to the laws under that constitution, till 1841. The duties since that time assigned to it, in the counties where it has existed, were

before that date mostly discharged by the clerks of the Circuit Courts, officers created by the old, and continued by the new, constitution. In 1841, the office of county auditor was created by statute. But in 1844, the legislature passed an act (Gen. Laws 1844, p. 46) abolishing it in the counties of *Owen*, *Greene*, *Washington* and *Carroll*, and restoring the duties then performed by the auditors to the clerks in said counties. This act had not been expressly repealed at the formation of the constitution of 1851, nor at the commencement of this suit, and under it and the general law, *Cavins*, the defendant, was, at those times, holding the office of clerk in *Greene* county, with a prospective term of several years.

In 1851, the new constitution was adopted, containing this provision, viz.: "All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed;" and this further provision, viz.: "Every person elected by popular vote, and now in any office which is continued by this constitution, and every person who shall be so elected to any such office before the taking effect of this constitution, (except as is in this constitution otherwise provided,) shall continue in office until the term for which such person has been or may be elected, shall expire: *Provided*, That no such person shall continue in office after the taking effect of this constitution, for a longer period than the term of such office in this constitution prescribed."

Now, it is very obvious that these two provisions continued *Cavins* in office as clerk, and continued in force the act conferring upon him the duties of the abrogated auditor's office, if said act was not inconsistent with some other clause or clauses of the new constitution. It is claimed that it was inconsistent with two of its provisions, to-wit, that which declares that in all cases "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state," (art. 4, s. 23); and that which declares that "there shall be elected, in each county, by the voters thereof, at the

Nov. Term, 1853.

JONES v. CAVINS.

time of holding general elections, a clerk of the Circuit Court, auditor, recorder," &c. (Art. 6, s. 2).

That said act was not inconsistent with the former of these two provisions, is decided in *The State* v. *Barbee*, 3 Ind. R. 258, where it is held that that provision was prospective in its operation, and would only affect legislation under the constitution of which it formed a part. This point will, therefore, be no further considered here.

Was it inconsistent with the latter of said two provisions? Upon the affirmative of this question, the counsel for the plaintiff mainly rely. Let us examine it with care.

In *August*, 1851, *Cavins* is in the office of clerk of the Circuit Court of *Greene* county, to which office certain duties are attached by a local law, which duties pertain to the office of auditor in certain counties. The office of auditor does not exist in said *Greene* county. A new constitution for the state is formed, and, at that date, adopted, which provides that an auditor shall be elected in said county, "at the time of holding general elections," the first of which said elections is to take place on the second *Tuesday* in *October*, 1852. Now, it is clear that no conflict existed between the law under which *Cavins* was acting and this provision of the constitution, from *August*, 1851, to *October*, 1852, as till then no auditor was to be elected in *Greene* county, and, of course, could discharge no duties in it. But in *October*, 1852, *Jones* is elected auditor in said county, and the question now arises as to the relation between him and *Cavins*, the clerk. Is the latter bound to surrender a portion of his duties to the former, and, if so, what? It devolves upon *Jones* to point them out before they can be adjudged to him. No law prescribing the duties to be performed by the auditor has been passed since the constitution created his office; and the simple fact that he is auditor of *Greene* county, does not authorize him to invade the clerk's office and take from the clerk his books, &c., and the discharge of any of his duties. The office of auditor

may exist without any duties attached to it. We have said no law had been enacted defining the duties of the auditor, but the constitution must also be looked into; for if his duties are there defined, his right to exercise them may be perfect without legislative action. Turning to it, we find this, and only this, ordained touching the point, viz., that all county officers, &c., shall "perform such duties as may be directed by law." Art. 6, s. 6.

The constitution, then, imposes no duties upon the auditor, but leaves him dependent, for any he may obtain the discharge of, upon the legislature; and that body may or may not, at its pleasure, assign them to him, and, should it do so, the duties assigned might be of a different character from any of those now performed by the clerk of *Greene* county—they might be taken from other officers, or new created.

There is no conflict, then, between the provision of the constitution under consideration and the law under which *Cavins* is discharging the official duties assigned him.

But it is argued that *Jones*, on being elected auditor, had a right to discharge the duties attached by law to the office in other counties in the state, or that were attached to it by a former law, in *Greene* county.

We are unable to discover any foundation upon which such a proposition can rest. As to the former law in *Greene* county, it had been expressly repealed, and we think the subsequent creation, by a constitutional convention, of the office of auditor, could not have the effect to revive it. That convention created the office, but did not assume to create its duties.

As to the laws prescribing the duties of auditors in force in other counties under the old constitution, and continued by the new, there is no clause in the latter, which, in terms, extends their operation beyond the boundaries then limiting it, or from which an intention to do so can be inferred. It simply declares that they shall be in force till they expire by their own limitation, or are repealed by a legislature. The convention that framed the constitution was not created to legislate; but to declare a

Nov. Term, 1853.

JONES v. CAVINS.

law in force in a portion of the state where it did not exist before, would be legislation. We do not think the convention attempted it in this particular, though we must not be understood as deciding upon its power to have done so. Great difficulty—indeed, actual impossibility—would practically attend the position assumed by counsel. The law in relation to county auditors was not uniform, at the making of the new constitution, in the counties in which such an officer existed; and if it be asserted that that instrument had the effect to extend some law on the subject over the state, then the question must be answered, which of the different laws existing in various parts of the state was the one that overrode all the others? The position, in fact, is scarcely reconcilable with the express language of the constitution, which is that the auditors shall perform such duties as "may be directed by law," evidently looking to future legislation under said new constitution.

We see nothing upon the point of *Cavins's* holding two offices, as, from what we have said in the cause, it appears that he held but one.

We conclude, then, that the law of 1844, which restored to the clerk of *Greene* county the duties for a time transferred from him to an auditor, was continued in force by the new constitution, because said constitution does not retransfer said duties, nor assign any other, to the auditor of said county.

Another question is made in the cause. The information, as we have stated, was filed pursuant to the provisions of the R. S. of 1852, in *April*, 1853, and it is contended by the defendant that those statutes were not then in force, as they had not been filed in all the counties of the state, though they had been distributed to the county of *Greene*. They were not distributed to all the counties in the state till the 6th of *May*, 1853.

The decision of this question must depend on the construction given to the following clause of the constitution:

"No act shall take effect until the same shall have

been published and circulated in the several counties of this state, by authority, except in case of emergency; which emergency shall be declared in the preamble, or body of the law." Art. 4, s. 28.

On one side, it is insisted that, under this provision, a general law, designed to operate throughout the whole state, cannot take effect anywhere till it is distributed to all the counties in the state; while, on the other, it is claimed that every such law comes into force in each separate county on its being filed therein. All agree that the law does not operate over the whole state till it is filed in all the counties of the state. The difference, then, is in regard to the manner in which a law in this state gets into force; one side contending that it comes in at the same moment throughout the whole state; the other, that it comes in by piecemeal, dragging its slow length along through the period of two or three months.

By the common law, a statute took effect at once throughout the jurisdiction to be governed by it. So it did under our former constitution, where there was no express legislative direction on the subject. In *England*, a statute took effect from the first day of the session of parliament enacting it. In this state, under the former constitution, from the time it was "published in print, by authority, at any place within the state." *Tredway* v. *Gapin*, 1 Blackf. 299. It had, however, before the framing of the new constitution, become a common practice for the legislature to provide that laws should take effect in each county when filed therein, thus producing, for a considerable length of time, an entire want of uniformity in the laws in force.

In this state of things, the constitutional convention framed the provision we have quoted, declaring that no law should take effect till it was "published" and "circulated" (two words, as here used, meaning the same thing) "in the several counties of this state;" and we think the intention was to arrest the piecemeal mode in which laws had, for a time, been brought into operation, and to make their taking effect a single entire thing

Nov. Term, 1853.

JONES v. CAVINS.

throughout the state. It seems to us that the language of the constitution will fairly admit of no other construction. It speaks of no partial taking effect of a law, no coming into force in the different or several counties, but it speaks of its taking effect as a single event, after distribution in the several counties. The term, "several counties," is used in connection with the distribution, not the taking effect of the laws. Had the language been that laws should take effect in the several counties on distribution, &c., the construction contended for by the plaintiff might have prevailed; but such is not the language; it is prohibitory and clear. It says that no law shall take effect, any effect, anywhere, till a certain condition precedent has been performed, viz., till it has been distributed in, not one or more, but the several counties of the state. Now, the several counties of the state are all the counties of the state. If the law enacted that no opinion should be delivered by the Supreme Court till it had received the approval of the several judges of said Court, would it be pretended that an approval by a less number than all of said judges would fill the requirement of the law?

We think the revised statutes did not take effect till distributed to all the counties in the state.

If it be said that inconvenience will result from this construction, we here only answer that one way in which it may be easily obviated, is by the legislature providing that hereafter evidence shall be furnished to the auditor of state of the time of filing the laws in the several counties, and that, upon their being filed in all, proclamation shall be made of the fact, in a certain number of days after which the laws should come into force.

We may remark that we do not decide that, had it been important to the plaintiff, he might not have amended, should it have been deemed necessary, his information.

Per Curiam.—The judgment is affirmed with costs.

D. McDonald and *J. Sullivan*, for the appellant.

I. Blackford, *G. G. Dunn*, and *W. T. Otto*, for the appellee.

Nov. Term, 1853.

Davis *v.* Bass and Another.

Davis v. Bass. 4 Ind. 313, 146 991

A party who has moved for a new trial at law, and the motion having been overruled on the merits, has prosecuted a writ of error for the refusal of his motion, to final judgment against him, cannot afterwards sustain a bill in chancery for a new trial founded upon the same reasons alleged therefor at law.

ERROR to the *Lawrence* Circuit Court.

Monday, November 28.

Stuart, J.—*Davis* filed his bill in chancery, setting forth certain proceedings at law wherein he had been plaintiff. After praying process, answer, &c., the bill proceeds, "and that, upon the premises being found true, to adjudge and decree to the complainant a new trial of the issues in said common-law cause," &c.

It appears that *Davis* had sued *Bass* and another, in the *Lawrence* Circuit Court, for burning his steam saw-mill, laying his damages at 10,000 dollars. The result was a verdict of not guilty. *Davis* moved for a new trial, alleging, 1. That the verdict was contrary to evidence; 2. That one of the jurors had misbehaved; 3. That *Bass* had treated the jury to spirituous liquors; 4. That certain evidence had been improperly excluded; and, 5. Newly discovered evidence. The motion for a new trial was overruled, and judgment on the verdict. *Davis* excepted, and prosecuted his writ of error to the Supreme Court. But it does not appear that he set out the evidence.

It may be mentioned as part of the history of the case, that the trial at law was had in *December*, 1845. In *December*, 1846, and during the pendency of the law case on error in this Court, *Davis* filed his first bill in chancery in the *Lawrence* Circuit Court, praying, as now, for a new trial, &c. In *May*, 1848, the first bill was dismissed without prejudice; and in *May*, 1850, the present bill was filed. Demurrer to the bill sustained.

It is believed that every point made in this bill for a new trial, was made and determined by the Circuit Court on the motion for a new trial at law. Having compared

Nov. Term, 1853.

DAVIS v. BASS.

the causes there filed with those now insisted upon, we can discover no substantial difference.

The strongest point made, on both occasions, is the newly discovered evidence. It was supported, agreeably to the rule, by *Davis's* own affidavit, and that of *Owens*, the proposed witness, stating what he would testify. So that the motion in the law Court was not overruled in consequence of any informality. The remedy of *Davis* was complete at law by writ of error. Of this remedy it appears he has availed himself. It would be a dangerous feature in chancery jurisdiction if after all this, that Court had the power to wipe out proceedings at law, and remit the parties back to where they began.

Accordingly, on the part of the defence, we are referred to several authorities which seem conclusive against the prayer of the bill. Thus, when a party applies for a new trial to a Court of law, and it is refused, equity will not interfere. *Bush* v. *Craig*, 4 Bibb 168. Again, a bill in chancery to obtain a new trial at law should show that the complainant could not move for a new trial at the term at which judgment was rendered. *Ward* v. *Chiles*, 3 J. J. Marshall 486. So in *Simpson* v. *Hart*, it was held that when a Court of law has refused a new trial, the party will not be relieved in chancery. 1 Johns. Ch. R. 91.

There are other objections urged against the bill in argument; the want of diligence to procure the witness; *McIntire* v. *Young*, 6 Blackf. 496; the failure to set out the evidence adduced on the trial at law; the lapse of time between the trial and the filing of the bill;—all, perhaps, affording supplemental considerations against the relief sought, if there could remain any doubt about the correctness of the main position.

Per Curiam.—The decree is affirmed with costs.

J. S. Watts, for the plaintiff.

C. Dewey, for the defendants.

Nov. Term, 1853.

THE STATE on the relation of the BOARD OF COMMISSIONERS OF DAVIESS COUNTY *v.* CLARK and Others.

THE STATE v. CLARK.

4 130 315 6
4 131 315 373
4 140 315 75

There is a distinction in deposits of this kind: Where the very silver or gold deposited is to be restored, the transaction is a special or pure deposit; but where the party is to restore, not the identical coin, but only an equivalent, on demand, it is called a loan or *mutuum* or irregular deposit.

Semble, that the surplus revenue fund held by the state, is a deposit of the latter class.

It is doubtful whether in a suit upon a surplus revenue bond, any relator is necessary; though a responsible relator might be proper.

In legal contemplation the Board of Commissioners of a county is the county.

In a suit upon a surplus revenue bond the board of county commissioners is a proper relator.

ERROR to the *Daviess* Circuit Court.

Monday, November 28.

STUART, J.—*The State*, on the relation of the *Board of Commissioners of Daviess county*, sued *Clark* and others, on their writing obligatory as borrowers of the surplus revenue fund. The history of that fund,—its distribution, in 1836, among the states, and by this state to the counties to be loaned out on interest, need not be detailed.

General demurrer to the declaration sustained.

The only question discussed by counsel is whether the board of commissioners be the proper relator; or whether the suit should have been brought on the relation of the county treasurer.

The case of *The State* v. *Votaw* and others, 8 Blackf. 2, is referred to in argument. That was a suit on the relation of the treasurer of one county against the treasurer of another county about the surplus revenue fund. The county of *Blackford* had been carved out of the county of *Jay*, and was claiming her share of the surplus revenue from the latter county. This Court, on objection to the relator, decided that the suit was correctly brought on the relation of the treasurer of *Blacfkord* county. The reason given is, that, under the law, the treasurer has a

Nov. Term, 1853.

THE STATE v. CLARK.

possessory right to this fund, and a beneficial interest in it to the extent of his commissions.

The language of the Court, that "the state holds the fund as a depository," is objected to as incorrect. It is contended that the bailment, if any, is not a deposit but a debt. There is, however, a distinction in deposits. Where the very silver or gold deposited is to be restored, the transaction is a special or pure deposit. But where the party is to restore, not the identical coin, but only an equivalent, on demand, the books call it a loan or *mutuum* or irregular deposit. Story Bailm. ss. 47, 88.—*Coffin* v. *Anderson*, 4 Blackf. 395. To this latter class the distribution of the surplus revenue seems to belong. Thus, whether regarded as a special or irregular deposit, the language of the Court in the case alluded to is equally applicable. For the purposes of that decision, further distinction was not necessary.

But in *The State* v. *Votaw*, *supra*, the Court intimate that the board of commissioners is not the proper relator. This position counsel in the case at bar also controvert.

It may well be doubted whether in these surplus revenue bonds any relator is necessary. The contract is directly with the state. The practice has been, in some circuits, to bring the suit in the name of the state simply, thus leaving it to the sheriff to determine who was entitled to receive the money at his hands when collected. One of the objects of a relator would be to direct the officer to whom he was to pay; and the costs might also be matter of consideration. A responsible relator might, therefore, be proper.

In the case at bar, the board of commissioners is the relator. It is a body corporate, capable of suing and being sued. R. S. 1843, p. 181. In legal contemplation, the board of commissioners is the county. It has the care of the property of the county, as well as its supervision and management. *Id.* 183, s. 14. The county is liable for the surplus revenue fund, and the county board is specially charged with the supervision of it.

The county, known in law only by her board of commissioners, is, therefore, interested in the fund. Admitting, then, the correctness of the decision in *The State* v. *Votaw*, to the extent that the question was fairly before the Court, and for the reason given, namely, that the treasurer of the county was properly relator, because interested to the extent of his fees, it would seem to follow that the board of commissioners is also properly relator, because interested to the extent of the entire fund. This view of the case is impliedly supported by *Sybert* v. *Ellis*, 3 Blackf. 229, and *Jones* v. *The State*, 5 *id.* 141.

It may be said that the relator is the party designated by the record to whom the money is to be paid, and that the board of commissioners, as such, have no right to receive it. But the same objection applies with equal force when the board of commissioners is directly plaintiff. The board recovers, but yet it cannot directly receive. Yet, in both cases, the board of commissioners do, in fact, receive the proceeds in the mode pointed out by law, namely, by the treasurer, who is the proper financial officer of the county. There would seem, therefore, to be very little force in an objection which if good against the board as relator, would be equally good against it as plaintiff in any suit. It seems conclusive that, in both cases, the money finds its way into the county treasury through the same channel. We can, therefore, see no good reason why the board of commissioners should not be the relator in the present case.

It is not deemed necessary to inquire whether the fact that the suit was on the official bond of an officer, as in *The State* v. *Votaw*, or on a money bond like the case at bar, would furnish any just ground for distinction. (1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the state.

(1) ROACHE, J. was absent.

May Term, 1853.

Bowers v. Headen.

Monday, November 28.

THE STATE on the relation of the BOARD OF COMMISSIONERS OF DAVIESS COUNTY *v.* CLARK and Others.

ERROR to the *Daviess* Circuit Court.

Per Curiam.—This case involves the same question, and the same reasoning is applicable, as in the next preceding case. (1)

The judgment is reversed with costs. Cause remanded, &c.

S. Judah, for the state.

(1) ROACHE, J., was absent.

BOWERS *v.* HEADEN.

Where the assignor of a note fills up the assignment with the name of the assignee, he thereby designates the person to whom he is liable.

But where he merely writes his name upon it, he agrees that the blank may be filled up by any *bona fide* holder, that the person whose name is filled in shall be his immediate indorsee, and that he will be liable to him as such.

Where the indorsement remains blank, the note may be passed by mere delivery.

These rules prevail in the assignment of notes under the R. S. 1843, as well as in assignments under the law-merchant.

Where there are intermediate full indorsements, the indorsee cannot, in his own name, sue a remote indorser at law.

Under the R. S. 1843, a promissory note in the form of a due bill, is negotiable.

Such a note when sold may be indorsed in full or in blank.

In a suit upon the assignment of a promissory note indorsed in blank, evidence that when it was indorsed the assignor told the person to whom it was delivered, *that he need not sue the maker as he was poor—that he, the assignor, would see it paid*, is not admissible.

Where, without reference to improper evidence admitted, the proof sustains the finding of the Court, the judgment will not be reversed.

May Term, 1853.

BOWERS v. HEADEN.

Monday, November 28.

ERROR to the *Parke* Circuit Court.

DAVISON, J.—*Headen* sued *Bowers* before a justice of the peace, upon the assignment of a note. The note was for the payment of 32 dollars and 84 cents, and in the form of a common due bill. It was given on the 12th of *April*, 1844, by one *Briggs* to *Bowers*, and by him indorsed in blank to one *Wright*, who, sometime in the year 1844, sold and delivered it, without assignment, to *Headen*. Just before this suit was instituted, the indorsement was filled up with the name of *Headen*.

The justice gave judgment against *Bowers* for the amount of the note and interest, and he appealed.

In the Circuit Court, *Bowers* filed a plea of non assumpsit, verified by oath. The cause was submitted to the Court by consent. The Court found for the plaintiff. There was a motion for a new new trial overruled, and judgment on the finding of the Court.

The record presents this question: Did the filling up of the blank vest the legal title to the note in *Headen*, and make him the immediate indorsee of *Bowers?* The point thus raised makes it necessary to determine what is the effect of a blank indorsement.

Where the assignor fills up the assignment with the name of the individual to whom he sells the note, he thereby designates the person to whom he is liable. But should he simply write his name upon it, he agrees that the blank may be filled up by any *bona fide* holder; that the person whose name is filled in shall be his immediate indorsee; and that he will be liable to him as such. This is obviously the true construction of full and blank indorsements under the *lex mercatoria*. And it seems to us that the same rule must govern assignments under our statute. *Nelson* v. *Dubois*, 13 Johns. R. 175.—*Manson* v. *Durham*, 3 Hill 584.—*Lynn v. Jeter*, 7 Blackf. 300.—*Lovel* v. *Everton*, 11 Johns. R. 52. The case last cited was a suit upon a non-negotiable note, and shows that when a blank indorsement is filled, the person whose name is put in becomes the immediate indorsee of the indorser.

By our statute, notes like the one in suit are negotiable.

Nov. Term, 1853.

Bowers v. Headen.

R. S. 1843, c. 31, s. 6. When sold they may be indorsed in full or in blank. It is true, their negotable quality is, to some extent, restricted; but none of these restrictions vary the effect of an indorsement as understood by the law-merchant. The rule is, that while the indorsement continues blank, the note may be passed by mere delivery, and it is competent for any holder to fill up the blank with his own name. There is nothing in the letter or spirit of the act referred to in conflict with that rule.

It is insisted that this suit cannot be sustained on the ground that there is no privity of contract between the assignor of the note and the present holder—that at most he is a remote indorsee, and his remedy, if he has any, was in equity. This is answered by stating the fact that the indorser merely wrote his name on the note, and thereby agreed that he would admit his liability to any *bona fide* holder who should please to fill up the blank with an assignment to himself. Where, however, there are intermediate full indorsements, the indorsee cannot, in his own name, sue a remote indorser at law.

We think that this suit was properly brought in the name of *Headen*. He was, no doubt, the legal owner of the note, and must be considered the indorsee of *Bowers*.

Upon the trial, *Wright* (to whom the note was, in the first instance, delivered,) was called by the plaintiff. He testified, *inter alia*, that when it was indorsed, *Bowers* told him that "he need not sue the maker, as he was poor—that he, *Bowers*, would see it paid." This testimony was admitted over the defendant's objection. In this, we think, the Court erred. The indorsement was, in legal effect, a written contract. It could not be varied or controlled by a verbal cotemporaneous agreement. *Odam* v. *Beard*, 1 Blackf. 191.—*Wilson* v. *Black*, 6 *id.* 509. This evidence tends to set up such an agreement. In effect, it makes the assignor liable, whether due diligence was or was not used to obtain the money from the maker of the note. This was not in accordance with his written engagement, and, therefore, the evidence was objectionable.

Still we do not consider that error of the Court suffi-

cient to reverse the judgment in this case. The evidence is all upon the record. It proves that when the note was assigned, the maker was completely insolvent and continued so up until the trial of the cause. In such case, a suit against him was not required to bind the indorser. *Youse* v. *McCreary*, 2 Blackf. 243. (1) Without reference to the improper testimony, the proof, in our opinion, sustains the finding of the Court. (2)

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

A. Kinney and *A. L. Roache*, for the plaintiff.

J. A. Wright, for the defendant.

(1) The insolvency which dispenses with the necessity of suing the maker of a note, before recourse can be had on the indorsee, means inability of the maker to pay any part of the given debt; and this it is incumbent upon the indorsee to prove in a suit against the indorser. *Herald* v. *Scott*, 2 Ind. R. 55. See, also, *Hardesty* v. *Kinworthy*, 8 Blackf. 304.

(2) Roache, J., having been concerned as counsel, was absent.

Winton and Others *v.* The State, on the relation of Ezra.

Section 381 of c. 40, R. S. 1843, which provides that "upon execution, the officer may levy upon any current gold or silver coin or current bank notes belonging to the judgment-debtor," does not authorize him to levy an execution issued on a judgment against the debtor upon gold or silver coin or bank notes in his hands, collected on an execution in favor of the debtor.

The coin and notes, while in the hands of the sheriff, are in the custody of the law, and do not belong to the debtor.

They are not subject to levy until they have come into the debtor's possession.

Nov. Term, 1853.

WINTON v. THE STATE.

Monday, November 28.

ERROR to the *Warren* Circuit Court.

DAVISON, J.—Debt against a sheriff and his sureties on his official bond.

The bond is conditioned in the usual form for the discharge of the duties of the sheriff, and for the payment over by him, to the proper persons, of all moneys received by virtue of his office.

Three breaches are assigned. They allege, substantially, that a writ of execution was issued from the Circuit Court, on a judgment therein rendered in favor of the relator and against one *Mark Manlove*, by virtue of which the sheriff had received 470 dollars in current silver coin and current bank notes; that while the money was in his hands, the relator demanded it of him, but he failed to pay it to the relator, into the clerk's office, or to any person entitled to receive it; that the sheriff had returned the writ into the clerk's office with his return, viz., that he had received said silver coin and bank notes, of which he had paid 46 dollars and 84 cents to the clerk for costs, retained 12 dollars and 21 cents, his own fees, and upon the residue, being 411 dollars and 26 cents, he had levied two executions, then in his hands against the relator.

The defendants pleaded five pleas. Demurrers to the first, second and fourth were sustained. Upon the third and fifth issues were made. Trial by the Court, and judgment for the plaintiff below.

The sustaining of the demurrer to the first plea is the only error assigned. That plea states, *inter alia*, that while the silver coin and bank notes specified in the declaration were in the sheriff's hands, he received two executions against the relator, viz., one in favor of *Albert Banta*, for 418 dollars, the other in favor of *Joshua Heath, et al.*, for 493 dollars, and both issued from the *Parke* Circuit Court, on judgments therein rendered; that by virtue of these writs he had levied upon the said silver and notes, and applied the same to the payment thereof, &c.

The position assumed by this plea raises the inquiry

whether the silver and notes levied on were subject to the executions.

We have a statute which provides that "upon execution the officer may levy upon any current gold or silver coin or current bank notes, belonging to the judgment-debtor." R. S. 1843, c. 40, s. 381.

But it is said that the sheriff had no authority to levy on that property when in his possession—that while there it was in the custody of the law, and in point of fact did not belong to the relator. We concur in that opinion. In *England*, there is a statute which enacts, "That the sheriff may and shall seize and take under a *fi. fa.*, any money or bank notes belonging to the person against whose effects such writ was issued." 1 and 2 Vic., c. 110, s. 12. Under this act it was held, "that money in the hands of the sheriff, collected for the person under another execution, could not be seized; but the statute applied only to money set apart and ear-marked, which was the property specifically of the party." *Wood* v. *Wood*, 4 Ad. and Ellis, N. S., 397. In the case cited, *Denman*, C. J., says, that "that statute was intended to remedy the defect which formerly existed in the execution of a *fi. fa.*, it being considered that nothing could be seized that could not be sold, and that money was not the subject of sale." If the construction thus given to the *English* statute be correct, it follows that our enactment did not sustain the act of seizing the property in question.

This view is supported in *Turner* v. *Fendal*, 1 Cranch 117. There the Court say, that although money could be taken in execution if in the possession of the defendant, yet it could not be so taken till it had been paid over to the person entitled to receive it, because, until so paid, it does not become his property: he has not the actual legal ownership of the specific pieces of coin which the officer may have received. Such a right can only be acquired by obtaining the legal or actual possession of them: until this be done, there can be no such absolute ownership as that an execution may be levied on them. *Ross v. Clark*, 1 Dall. 354.—6 Cowen 494.—2 Blackf. 363. (n. 1)

Nov. Term, 1853.

WINTON v. THE STATE.

We are referred to s. 460, c. 40, R. S. 1843. That section provides that "the officer collecting any money on an execution, shall pay over the same within twenty days after reception thereof, to the person entitled thereto, unless payment thereof shall have been enjoined." This, it is insisted, is a new provision, whereby a sheriff, when he collects money, holds it as the mere agent of the execution-plaintiff. That position is not strictly correct. The sheriff is said to be in some sort the agent of both parties to an execution; still he is the minister of the law, and as such, his duties are prescribed. The section just recited makes a single change in his duties; since that enactment he is required, when he collects any money on execution, to pay it directly over, within a specified period, to the person entitled to receive it. There is, however, another provision which requires him, when the writ is fully satisfied, to return it forthwith, and pay the money thereon collected to the clerk. R. S. 1843, c. 72, s. 8. The record shows the writ in question to have been fully paid; therefore, the sheriff was not required to pay the money over to the relator.

But whether he was required to pay to the relator or clerk, can make no difference in the decision of this cause. The silver and notes, while they remained in the sheriff's possession, were in the custody of the law, and were not subject to execution until they went into the relator's possession.

The plea, in our opinion, constitutes no bar to the action.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

R. C. Gregory, for the plaintiffs.

R. A. Chandler, for the state.

May Term, 1853.

ROGERS and Others *v.* HOWARD and Others.

ROGERS v. HOWARD.

4 325
148 220

The Probate Court had authority, under the R. S. 1843, and it was its duty upon a proper application, to grant a change of venue in proceedings under art. 3, c. 30, of those statutes, to contest the validity of a will.

ERROR to the *Decatur* Probate Court.

Tuesday, November 29.

ROACHE, J.—This was a suit instituted by the defendants in error, to contest the validity of the will of *Robert Rogers*.

The parties contesting filed their allegations in writing, setting forth their objections; the defendants answered; and an issue was made up whether the writing produced was the last will and testament. The jury returned a verdict against the validity of the will. The verdict was set aside by the Court and a new trial granted, which resulted in a second finding that the writing in controversy was not the last will of *Robert Rogers*.

The only point necessary to be examined in this case, arises upon the refusal of the Probate Court to grant a change of venue prayed for by one of the plaintiffs in error, previous to the second trial. At the proper time an affidavit was filed, alleging that a fair and impartial trial of the cause could not be had in the county of *Decatur*, because of the prejudice and odium which attached to him and his defence. The motion was overruled.

The defendants in error, in support of the ruling of the Court, assume the position that the Probate Court had no power to grant the change of venue in this case, because art. 3 of c. 30, R. S. 1843, on which the proceeding is founded, does not give any such power. It is true that article is silent on the subject. But it confers the exclusive jurisdiction in such proceeding on the Probate Court, and the 14th section of chapter 39, which prescribes the powers and duties of that Court, declares it "shall have power to grant changes of venue upon the conditions and restrictions, and according to the usages and customs of other courts of record in this state." In addition to this,

Nov. Term, 1853.

ROGERS v. HOWARD.

section 59 of the same article 3, provides that "in all matters relating to the mode of procedure, investigation, hearing and determination of such cause, which are not specially provided for in this article, such [Probate] Court shall proceed and be governed by the rules, regulations, and usages of Courts in other causes, so far as the same are applicable and proper."

We can perceive no reason why a change of venue may not become as applicable and proper in a contest of the validity of a will, as in any other proceeding in the Probate Court. The causes which make a change necessary in any trial, may and do exist with equal force in these proceedings.

This view of the case is sustained by a decision in an analagous case. The statute of 1838, p. 379, authorizing applications to be made before justices of the peace to enter satisfaction of judgments on their dockets, did not expressly provide for any appeal from their decisions in such cases. Yet the Supreme Court held that the general law authorizing appeals from the judgments of justices, was sufficient to sanction the appeal taken from a decision in such a case. *Creekpaum* v. *Templeton*, 5 Blackf. 583.

However reluctant we may be to disturb two concurring verdicts, supported, as it seems to us, by the preponderance of the evidence, the decision of the Court below is too clearly erroneous to admit of hesitation in reversing it. (1)

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Scobey, for the plaintiffs.

J. Robinson and *A. Davison*, for the defendants.

(1) DAVISON, J., having been concerned as counsel, was absent.

Nov. Term, 1853.

STRANGE and Another *v.* DONOHUE.

STRANGE v. DONOHUE.

To render a witness incompetent on the ground of interest, he must be interested in the event of the suit.

When it becomes material to ascertain with what motive an act was done, the declarations made by the party himself while doing the act, and explanatory of it, are admitted as being part of the transaction, and as serving to explain its real character.

A. obtained judgment against *B.* before a justice of the peace, and filed transcripts in the clerk's office and had them recorded, to bind *B.'s* land. Before he had procured an order for an execution, *B.'s* land was advertised for sale on an execution issued upon an older judgment. To prevent the sale, in order to procure an assignment of such older judgment, *A.* was advised by his attorney, who was also the attorney of the execution-plaintiff, to put in the sheriff's hands a sum sufficient to satisfy the execution, whereupon he, the attorney, would order a postponement of the sale to allow *A.* time to procure the assignment. *B.* accordingly paid that sum to the sheriff, he and the attorney stating to the sheriff that the money was not paid in satisfaction of the judgment, but merely to prevent a sale of the land in order to give *A.* the control of the execution and judgment. *Held*, that the handing of the money to the sheriff did not operate to satisfy the judgment.

APPEAL from the *Hendricks* Circuit Court.

Tuesday, November 29.

ROACHE, J.—Motion to enter satisfaction of a judgment.

The petition filed as the foundation of the motion, alleged that one *Donohue* had obtained a judgment against *Strange* and *Ellis*, in the *Hendricks* Circuit Court, in 1848, for 176 dollars and 86 cents; that execution was issued, and, with another against the same defendants, was levied on eighty acres of land belonging to *Strange*, which was advertised to be sold on the 28th day of *February*, 1852. The petition further alleged that on the day of sale, but before the sale actually took place, one *Andrew Clifton*, as the agent of *Strange* and *Ellis*, paid to the sheriff the full amount of the judgment, interest, and costs, in full satisfaction thereof; that the sheriff, for the purpose of defrauding *Strange* and *Ellis*, refused to return the execution satisfied, and that *Donohue* refused to receipt upon the judgment for the money received as above men-

Nov. Term, 1853.

STRANGE v. DONOHUE.

tioned, but still suffered the same to remain of record unsatisfied.

The defendant filed a plea denying, in general terms, that the judgment had been paid or satisfied, as alleged.

The facts disclosed by the testimony produced on the hearing, are as follows:

Sometime before the day set for the sale of the eighty acre tract levied upon by the sheriff, the same *Andrew Clifton*, who in the petition is alleged to have paid off the *Donohue* judgment, obtained three judgments against *Strange*, before a justice of the peace, amounting together to over 300 dollars, had taken transcripts and had them recorded in the clerk's office to bind *Strange's* real estate. *Strange* had no propety subject to execution except the eighty acre tract levied on. *Clifton* employed *Harvey* and *Gregg*, who were also the attorneys of *Donohue*, to collect these three judgments off *Strange*. They advised him to place in the sheriff's hands the money due on the execution; that then they, as the attorneys of *Donohue*, would order a postponement of the sale until judgments could be procured on the justice's transcripts, and also procure an assignment to him of *Donohue's* judgment. In pursuance of this advice, on the day of sale, but before the property was offered, *Clifton* handed the money to *Harvey*, and he and *Clifton* went together to the sheriff, explained their purpose to him, and distinctly told him that the money "was not paid in satisfaction of the judgment, but merely to prevent a sale of the land, and to get *Clifton* the control of the execution and judgment.

The money was, thereupon, counted out and paid to the sheriff, the sale was postponed, and *Harvey* immediately wrote to his client, *Donohue*, explaining the whole transaction, and informing him that upon his transferring the judgment to *Clifton*, they were authorized to remit the money. By due course of mail, they received a transfer of the judgment to *Clifton:* they also received the money from the sheriff and remitted to *Donohue*.

The sheriff testified that when *Harvey* came to pay him

the money on the day of sale, both *Harvey* and *Clifton* told him that it was handed him, not in satisfaction of the judgment, but to justify him, the sheriff, in postponing the sale until the judgment could be transferred to *Clifton*.

Upon the hearing the Court overruled the motion to enter satisfaction.

The appellants complain of the admission of *Harvey* as a witness, on the ground of interest. *Harvey* testified that he had a conditional fee from *Clifton* in the collection of his judgments; but stated that it was in no wise contingent upon the event of this suit. Nothing further appears on the subject. This formed no ground of objection to him as a witness.

It is also objected to the testimony of the sheriff, that he was permitted to detail "the statements of others." The only statements of others testified to by the sheriff, were the statements made to him by *Harvey* and *Clifton*, accompanying the delivery of the money to him, and explaining the purpose of its payment.

It frequently becomes material, as in the present case, to ascertain with what motive an act was done. In such cases, the declarations made by the party himself, while doing the act, and explanatory of it, are admitted as being a part of the transaction, and as serving to explain its real character. For this purpose they are admissible as being a part of the *res gestae*, and may be proved by the same testimony adduced of the fact itself. In this view, the admission of the testimony of the sheriff was correct. See *Haynes* v. *Rutter*, 24 Pick. 242.—*Kilburn* v. *Bennett*, 3 Met. 199.

We think the Circuit Court was right in overruling the motion to enter satisfaction. The design of *Clifton* in the transaction is obvious. He was desirous of protecting the property out of which was his only hope of making his own junior judgments, from being sacrificed. He was advised by his counsel that the proper course to effect that object was, to purchase and thus control the *Donohue* judgment; that in order to do this, it was necessary to deposit the amount of that judgment in the hands of the

Nov. Term, 1853.

Strange v. Donohue.

sheriff, so as to procure a postponement of the sale which was then impending, until the transfer of the judgment could be made. It was certainly legitimate for him to protect himself by buying in a senior judgment. His doing so certainly can be no cause of complaint to the judgment-debtor, *Strange*. *Clifton's* acts cannot possibly place him in any worse position than he would otherwise have been.

It is strenuously insisted that the handing the money to the sheriff operated as a satisfaction. Unexplained it would unquestionably: even if the manner and purpose of the payment were left in doubt by the testimony, it might be a question whether it should not be treated as a satisfaction.

It is true, we do not see any clear reason given why he was advised to place the money in the hands of the sheriff; but it is equally clear, from all the testimony, for what purpose it was placed there. That purpose was legitimate. It could not possibly do injustice to any one.

No fraud is charged on *Clifton*. The evidence shows that he designed, in good faith, to buy the *Donohue* judgment, and that he pursued the course he was advised was proper and necessary. It would be a gross perversion of justice to apply the money he paid for the purpose of purchasing, in satisfaction of the judgment. (1)

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave, for the plaintiffs.

J. S. Harvey and *J. M. Gregg*, for the defendant.

(1) Davison, J., was absent.

WOOLLEN *v.* THE BOARD OF COMMISSIONERS OF JEFFERSON COUNTY.

County treasurers were not, under the R. S. 1843, entitled to a per cent. for paying out that part of the revenue collected on the tax-duplicate.

Tuesday, November 29.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—*Woollen*, the treasurer of *Jefferson* county, at his settlement with the commissioners of said county in 1851, charged two and a half per centum for disbursing that portion of the county revenue collected on the tax-duplicate, and claimed an allowance, by the commissioners, of said charge. They refused to allow it. *Woollen* appealed to the Circuit Court, where the decision of the commissioners was affirmed. *Woollen* appealed to this Court.

The controversy grows out of a difference in the construction given by *Woollen* and the commissioners respectively, to the statutory provisions fixing the compensation of county treasurers. Those provisions are in the R. S. of 1843.

Section 71, p. 221, enacts that "the fees to be allowed the county treasurer, for the collection of taxes, shall be eight per centum on the first one thousand dollars, seven per centum on any sum between one and two thousand dollars, six per centum on any sum between two and three thousand dollars, five per centum on any sum between three and four thousand dollars, four per centum on any sum between four and five thousand dollars, and three per centum on any sum over five thousand dollars, by him collected as aforesaid."

Section 90, on page 195 of the same statutes, provides that "each county treasurer" "shall be allowed for his services, two and one-half per centum on all moneys received, and a like per centum on all paid out," "excepting the receipt of that collected on the tax-duplicate, and excepting that which is paid out to the state as her reve-

Nov. Term, 1853.

WOOLLEN v. THE BOARD OF COMMISSIONERS OF JEFFERSON COUNTY.

nue, and excepting that on which some other rate of compensation or fee for receiving or paying out, or both, is fixed by law."

Now, the question is, whether the exceptions in section 90 take the whole amount, both as to its collection and disbursement, of the moneys collected for the county upon the tax-duplicate, out of the operation of the main provision of said section, and place it, as to the entire compensation the treasurer is to receive for collecting, securing, and disbursing, under the operation of section 71 above quoted.

We do not consider it very clear upon the language of those sections, and, hence, must endeavor, if possible, to ascertain the intention of the legislature from other legitimate sources, to aid us in resolving the doubt left by their language.

We look in this case to subsequent and previous legislative action.

In 1852, the legislature had the subject before them, and enacted that the county treasurers' fees should be precisely those established in 1843 for collecting, and, as to disbursing, say explicitly, two and one-half per centum on "all other moneys other than tax and school fund," provided that amount would not raise the compensation of any given treasurer to over 1,000 dollars a year, that being the highest compensation allowed for one year's services. R. S. 1852, vol. 1., p. 286.

In 1853, the legislature again considered and acted upon this question, and the only change they made touching the compensation of county treasurers was to strike out the proviso limiting the ultimate amount in all these cases to 1,000 dollars per annum. Laws 1853, p. 67.

Since 1852, then, the legislature have left no doubt as to their intention that the county treasurers should not receive any compensation for securing and disbursing moneys collected on the tax-duplicate, but should rest satisfied with the average of from 4 to 5 per cent. which they are allowed for collecting; and no reason can be given why a different and higher compensation should

have been intended in 1843. And, looking backward to the laws on the subject prior to this latter date, we find that county treasurers were allowed but 3 per cent. for collecting, securing, and disbursing all the county revenue except that received on the sale of county lots, on which they were allowed nothing. R. S. of 1831, and of 1838, title, County Treasurer.

In view of this legislation, we can come to no other conclusion than that arrived at by the commissioners and the Circuit Court of *Jefferson* county, viz., that county treasurers were not, under the law of 1843, entitled to a per cent. for paying out that part of the county revenue collected on the tax-duplicate.

Per Curiam.—The judgment is affirmed with costs.

J. G. Marshall and *W. M. Dunn*, for the appellant.

J. Sullivan, for the appellees.

JUDAH *v.* THE AMERICAN LIVE STOCK INSURANCE COMPANY. 4 388 142 394

In 1850 the legislature enacted a law the first section of which declared that all such persons as should become stockholders to the capital stock thereinafter mentioned, their successors, &c., should be and were thereby constituted a body corporate by the name of the *American Live Stock Insurance Company.* The second section enacted that one *A.* and seven others named, or a majority of them, should be commissioners to receive subscriptions of stock, and that, when two hundred shares should be subscribed, they should call a meeting of the stockholders "by an advertisement published in such place or places as the commissioners might determine, stating the time and place at which such meeting of the stockholders shall by ballot elect the first directors of said company." It was further enacted that the stock should be in shares of 50 dollars each, and that, at the time of subscribing, there should be paid an instalment of 1 dollar on each share subscribed, and that the remainder should be paid at such time and on such terms as should be determined

Nov. Term, 1853.

JUDAH v. THE AMERICAN LIVE STOCK INSURANCE CO.

by the president and directors of the company. Under this law, articles of association were prepared, the subscribers to which severally undertook to pay 5 per cent., in cash, at the time of subscribing, and to secure the balance by executing a promissory note, to be approved by the directors, payable on demand. *B.* became a subscriber of ten shares, and executed his note for the amount of his subscription, less 5 per cent., payable on demand "in such sums and at such times as might be duly assessed thereon by order of the directors to meet the exigencies of said company." In a suit against *B.* upon his subscription and note,

Held, that the question whether the exigencies of the company required the payment of the instalments, could not be raised in a suit at law to recover them.

Held, also, that the fact that the commissioners may not have met to receive subscriptions, nor called a meeting of the stockholders to elect directors, did not annul or vitiate the existence of the corporation.

Held, also, that the provision in said section 2 for the raising of the stock and bringing about the first election of directors, was directory, and merely for convenience, and not essential to the validity of the corporate organization.

Held, also, that a plea setting up that 1 dollar on a share was not paid at the time of subscribing, was no defence to the action.

Held, also, that the facts that one *C.*, who received the subscription, represented that he was authorized to receive the subscriptions, when he was not, and that the directors had not ordered it to be taken, were no defence to the action.

Held, also, that the first section of the company's charter created the corporation out of the stockholders; and, so soon at least as the stock was subscribed, the corporation was complete, without the election of directors, and without a formal organization.

Semble, that a person who has contracted with an organization as a corporation, is estopped from denying its legal corporate existence, at the date of his contract, where there is no fraud.

On questions as to the power of corporations to deal in their corporate capacity with third persons, they will be limited by the terms of their respective charters; but, on questions relating to the mere manner of getting them into operation, a liberal construction of their charters will be adopted.

Where the particular facts set up in a special plea are admissible in evidence under a general plea filed in the cause, it need not be examined whether a demurrer to the former plea was improperly sustained or not.

Tuesday, November 29.

APPEAL from the *Knox* Circuit Court.

PERKINS, J.—On the 2d day of *January*, 1850, a public law was enacted, the first section of which declared—"That all such persons as shall become stockholders to the capital stock hereinafter mentioned, their successors

and assigns, shall be and are hereby constituted and made a body politic and corporate, by the name and style of *The American Live Stock Insurance Company.*"

The second section enacted that *Hiram Decker*, M. D., and seven other persons named, or a majority of them, should be commissioners to receive subscriptions of stock, and that when two hundred shares might be subscribed, a meeting of the stockholders should be called by them for the election of directors.

By the fourth section it was provided that the stock should be in shares of 50 dollars each, and that, at the time of subscribing, there should be paid "an instalment of one dollar on each share of stock" subscribed, and that the remainder should be paid "at such time and on such terms as should be determined by the president and directors of said company." Local Laws 1850, p. 146.

Under this law articles of association were prepared, as follows:

"Subscription to the capital stock of *The American Live Stock Insurance Company.* Conditions of subscribing:

"1. 5 per cent. to be paid in cash at the time of subscribing;

"2. The balance to be secured by executing a promissory note, payable on demand, to be approved by the directors.

Date of Sub.	Names.	Residence.	No. of Shares.	Cash Pay't.
January 21.	*B. S. Whitney*	*Vincennes.*	10.	25."

Then follow forty-two additional subscribers, with an aggregate of two hundred and twenty-eight shares, *Samuel Judah* being the last, and a subscriber of ten shares.

Subsequently the following note was executed:

"$475. No. 28. *Vincennes, February* 9th, 1850. On demand, I promise to pay to the order of *The American Live Stock Insurance Company*, for value received, four hundred and seventy-five dollars, without any relief whatever from valuation or appraisement laws of the state of *Indiana*, in such sums and at such times as may be duly assessed hereon by order of the directors, to meet the exigencies of said company. [Signed] *Samuel Judah.*"

On this subscription of stock and this promissory note,

Nov. Term, 1853.

JUDAH v. THE AMERICAN LIVE STOCK INSURANCE CO.

by a declaration containing all proper averments, suit was commenced by the company on the 5th day of *August*, 1851.

To the suit the defendant pleaded fourteen pleas. On seven of them issues of fact were made, and to seven demurrers were filed and sustained. The issues of fact were tried and found for the plaintiff, who had final judgment for the amount of the note.

The seven pleas on which issues of fact were found, were the general issue, and pleas denying the existence of the corporation, denying that any assessment had been made, and setting up a want of consideration and fraud generally, and asserting payment and a set-off.

The seven pleas demurred to set up in defence that the exigencies of the company did not demand the payment of the money; that the subscription and note were obtained by fraud, in this, that one *Benjamin S. Whitney* represented that the company was duly organized, and that he was authorized to receive subscriptions of stock, when such were not the facts; that the commissioners named in the charter never met to receive subscriptions of stock, and did not call a meeting for the first election of directors; that 1 dollar on a share was not paid at the time of subscribing, on two hundred shares; and that the directors did not order the raising of additional stock.

Such is the case.

The question whether the exigencies of the company required the payment of the instalments, was not one to be raised in a defence to a suit at law for the recovery of the instalments. The charter declares that they shall be paid on the call of the directors, and the terms of subscription of stock and the note sued on say the same thing. The note adds, in meaning, what the contract and law themselves, without the addition, would imply, that the instalments collected should be for the general uses and necessities of the corporation. But the question whether those necessities demanded the payment of the money, was for the directors; and when payment was ordered by them, it was necessarily to be made.

Policy, as well as a reasonable construction of the charter and contract, requires that such should be the rule of decision. If every stockholder in an insurance company like that in question, might be allowed to dispute the necessity of every assessment upon his stock, the right of those insured to obtain a speedy reimbursement of losses would be placed too much at hazard.

The plea setting up that 1 dollar on a share was not paid at the time of subscribing, was no defence to this action. The mutual subscription of stock by the members of the corporation, for the accomplishment of the object proposed, constituted a good and valuable consideration for each separate subscription, and each subscription became a legal and valid obligation to the company. The provision that the small sum of 1 dollar on each share should be paid at the time of subscribing, was inserted to supply the funds necessary to meet the expenses incident to raising and putting into operation the corporation, and, hence, might be waived so far as its enforcement was not necessary for that purpose. This must be so, for, should the amount of stock required by the charter to authorize the company to transact business, never be obtained, the money derived from the dollar payment of those subscribing would never be applied to any other object than the payment of expenses, and to that object it might be applied, if needed, whether the company ever went into operation or not. But if we are wrong in this view, still that plea must be bad, for it limits its denial of the payment of 1 dollar on a share to the time of making the subscription, and does not allege that it was not made on all the two hundred and twenty-eight shares subsequently, and before the organization of the company. Such a payment would have been a sufficient compliance with the charter. The provisions contained in it in regard to the getting up of this insurance company, were not necessarily to be literally, but only substantially, complied with. No good could result from adopting the opposite rule of decision, while much inconvenience and harm might be the consequence. On questions as to power of dealing in a

Nov. Term, 1853.

JUDAH v. THE AMERICAN LIVE STOCK INSURANCE CO.

corporate capacity, with third persons, these companies must be limited by their respective charters; but on those relating to the mere manner of getting into operation—of becoming prepared to act—a liberal construction is to be adopted. Where these questions arise upon evidence, we have already held that "every presumption is indulged in favor of the legal existence of a corporation after it has gone into operation." 2 Ind. R. 437. It will hardly be contended, we think, by any one, that the provision in the charter under consideration should be so construed as to invalidate the entire, or a single subscription even, that may have been made on one day without payment of the dollar on the share, but upon which the amount was tendered and accepted on the following day, and before the going into operation of the company.

The facts that *Whitney* was not, at the time, authorized to receive the subscription, and that the directors had not ordered it to be taken, are of no weight. If the subscription of stock was accepted by the company, all previous want of authority in the agent was cured, and the object of the subscriber in making his subscription, fully accomplished. And if *Whitney* made fraudulent representations in obtaining the subscription which vitiated it, the defendant might have shown them upon the trial of the issue upon the general plea of fraud, and of the general issue. Hence, the decision below in reference to those representations as set forth in the special plea of fraud, upon demurrer, need not be here examined.

The remaining questions raised relate to the organization of the company under the provisions of the second section of the charter. That section is as follows:

"That *Hiram Decker, M. D.*," and seven other persons who are named, "or a majority of them, shall be commissioners to receive subscriptions to the capital stock of said company, which subscriptions shall be received upon such notice and at such time and place as said commissioners shall direct; and as soon as two hundred shares of said stock shall be subscribed, said commissioners shall call a meeting of the stockholders, by an advertise-

ment published in such place or places as the commissioners may determine, stating the time and place at which such meeting of the stockholders shall by ballot elect the first directors of said company."

The latter part of the section is loosely drawn, imperfectly and somewhat vaguely expressed, but its meaning can be made out.

Before proceeding to compare the action of the company with its provisions, it should be premised that the first section of the charter creates the corporation out of the stockholders. So soon as the stock is subscribed, at least, the corporation is complete without the election of directors and without a formal organization. The section declares that "all such persons as shall become stockholders," &c., "shall be, and are hereby constituted and made a body politic and corporate," &c.

It may also be observed, that it seems to be the law that a person who has contracted with an organization as a corporation, is estopped to deny its legal corporate existence at the date of his contract, where there is no fraud. *John* v. *The Farmers'*, &c., *Bank*, 2 Blackf. 367.—*The Guaga Iron Company* v. *Dawson*, 4 *id.* 202.—*Morgan* v. *The Lawrenceburgh Ins. Co.*, 3 Ind. R. 285.—*Trumbull County Mutual Ins. Co.*, v. *Homer*, 17 Ohio R. 407.—*South Bay Meadow Dam Co.* v. *Gray*, 30 Maine R. 547.—*Vermont Central R. R. Co.* v. *Clayes*, 21 Verm. R. 30.—*Caryl* v. *McElrath*, 3 Sandf. (N. Y.) R. 176.

If such estoppel exists as to third persons, much more should it be held to as against a stockholder, a member of the body associated, one who may have participated in its organization, such as it may have been.

But was the corporation in the present case, so far as appears by the record before us, illegally organized? It is not denied that the requisite amount of stock had been subscribed, nor is it that directors had been elected by a vote of all the stockholders; but it is said that the commissioners named in the act did not meet to receive said subscriptions, and did not call a meeting of the stockholders to elect directors. Suppose this all true, does it

Nov. Term, 1853.

JUDAH v. THE AMERICAN LIVE STOCK INSURANCE CO.

vitiate the existence of the body corporate? We do not see why it should. An act is passed to create an insurance company. It is to consist of the stockholders. But it seems proper that, for convenience, some persons should be designated to take the initiatory steps in getting up the company; and, at a proper time, to call the members together to fulfill another requirement of the charter, viz., the election of directors. Thus concert and union of action would be secured, when, otherwise, it might not. The persons designated to perform these acts need not be, and are not in the charter before us, made members of the corporation. Now, it is plain, that the material things to be accomplished here are, the procurement of the stock, and the election thereupon, by the stockholders, of directors. These things done, all is accomplished, thus far, that the law, the interest of the corporation, or the interest of the public, requires. Can it, then, be matter of importance whether the subscription paper for stock was drawn up and circulated by *Hiram Decker* and seven others, or by *John Doe*, so be it was properly drawn up and filled with the requisite number of responsible subscribers? And can it be matter of importance, after the thing is over, whether the stockholders came together on the morning of the day of election, on a notice given by *Hiram Decker* and seven others, or without a notice at all, so be all came, and in a proper and satisfactory manner, elected their directors? Suppose the commissioners named had neglected or refused to act, (and which, according to the plea, must have been the case) could not the company have been gotten up?

It seems to us that the provisions in section two of the charter, for the raising of the stock and bringing about the first election of directors, were directory and merely for convenience, and not essential to the validity of the corporate organization.

The corporation, then, so far as appears, being legally organized, and there being no unperformed act set up in defence in this suit, the performance of which was made a condition precedent to the right to sue for the assess-

ment of stock, the judgment of the Court below, for the plaintiff, was right, and must be affirmed with costs, and 2 per cent. damages.

It may be observed that some points were made on the trial of the issues at law, but they were the same as those raised by the demurrers, and are decided in the decision above made.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

S. Judah, for the appellant.

B. M. Thomas, for the appellees.

ENNIS *v.* VANTREES.

Where the bill of exceptions does not profess to contain all the evidence, and a motion for a new trial does not appear to have been made, the presumption is that there was other evidence, and that the action of the Court was correct.

Tuesday, November 29.

ERROR to the *Daviess* Circuit Court.

STUART, J.—This case was brought up on appeal from the justice, &c., to the Circuit Court. On trial by the Court, finding and judgment for the plaintiff below.

Ennis contends that the evidence was not sufficient to sustain the judgment. There is a bill of exceptions signed by the associate judges, but it does not appear from the record that *Ennis* interposed any motion for a new trial, or that the bill of exceptions contains all the evidence. The presumption is, that there was other evidence, and that the action of the Circuit Court in the premises was correct.

Nov. Term, 1853.

MAIZE v. THE STATE.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

R. A. Chandler, for the plaintiff.

S. Judah, for the defendant.

---

4 [illegible]
130 [illegible]
4 342
138 400
4 342
145 487

MAIZE *v.* THE STATE.

Prosecution under the act of *March*, 1853, for retailing spirituous liquor without license. The defendant admitted the selling without license, as charged. *Held*, that the question of the power of the legislature to prohibit the sale of spirituous liquor was not involved in the cause. *Held*, also, that the defendant's admissions were sufficient to authorize a conviction, if the law was constitutional.

The judiciary look to the acts of the legislature with great respect, and reconcile them with the constitution, and sustain them, if possible.

The presumption that an act of the legislature is in violation of the constitution is not to be indulged, unless it is clearly subversive of that instrument.

Such a presumption cannot arise from the mere fact that an act is imperfect or impolitic.

It is the right and duty of the courts to inquire into the constitutionality of the acts of the legislature, whenever such questions are judicially presented.

A construction of the constitution by the legislature, where it is restrictive of legislative authority; or where the constitutional question has not been considered by that body; or where such legislative construction is not continuous and concurring, is not entitled to much weight; and as between two legislative constructions differing from each other, that more nearly contemporaneous with the constitution, would seem to be the better authority.

Sections 22 and 23 of the constitution of 1851, were designed to remedy the evil of local and special legislation which had grown up under the old system.

The law-making power being vested by the constitution of 1851 in the general assembly, the exercise, by any other body, of the power to make, sanction, suspend, or give effect to, the laws is necessarily excluded.

The term "operation of the laws," as used in s. 26 of art. 1 of the constitution of 1851, seems to mean, their taking effect and continuing in force.

So much of the act of *March*, 1853, "to regulate the retailing of spirituous liquor," &c., as relates to the popular vote, is in conflict with ss. 25 and 26 of art. 1, and, also, of ss. 22 and 23 of art. 4, of the constitution.

Submitting laws to the vote of the people in their primary capacity, is subversive of the representative system and inconsistent with the constitution.

It is, also, inconsistent with the constitutional provision requiring the yeas and nays on the final passage of a bill.

As a license law, the act in question is complete without the part relating to the township vote; and a license may issue upon the filing of the requisite bond.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Tuesday, November* 29.

STUART, J.—This was a prosecution under the act of *March*, 1853, for retailing spirits without license. *Maize* admitted that the liquor was sold as charged. The cause was submitted to the Court. Finding and judgment for the state.

Among the "agreed facts" are the following: The prosecuting attorney admitted that at the time of the sale, the act of *March* 4, 1853, was not of uniform operation throughout the state, in this, viz., that some townships voted "license," others "no license;" that the township in which the liquor was sold voted "no license;" and that the act in question was, at, &c., in force, so far as publication could make it.

It is not worth while to inquire whether it was competent for the parties to make admissions of matters of law which the courts must judicially notice.

Counsel discuss several points as arising in the record, and which will be briefly noticed in their order.

First. Can the general assembly prohibit the sale of spirituous liquors?

This question does not seem to be involved in the case. The late act is not, either in terms or in its practical effect, prohibitory throughout the state. That it may become so, depends upon the happening of a particular and not very probable event. Whenever that question is di-

Nov. Term, 1853.

MAIZE v. THE STATE.

rectly presented, it will be time enough to inquire whether it is any longer open for discussion, since the series of elaborate opinions in the liquor cases, in 5 How. (U. S.) R., 577. On this point it is not deemed necessary to go beyond the decision in *Bepley* v. *The State*, at the last term. (1)

The second point is stated thus: "Admitting the act to be constitutional, is the evidence sufficient to justify the finding of the Court?"

We cannot see why it is not clearly so. *Maize* admits the sale of the liquor as charged—admits everything the state could be required to prove to entitle her to a conviction. If there is any prerequisite in the statute which is constitutional and with which he has not complied, then are the finding and judgment of the Common Pleas fully sustained.

The third point is presented in these words: "Is the act of *March* 4, 1853, or so much thereof as requires it to be submitted to a vote of the people of the several townships, constitutional?"

Such questions are always regarded by the courts as of serious importance. The judiciary look to the acts of the legislature with great respect, and reconcile and sustain them, if possible. The general assembly is the immediate exponent of the popular will,—expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the constitution, is not to be lightly indulged. That the act is imperfect or impolitic is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the courts, it must be clearly subversive of the constitution. *Fletcher* v. *Peck*, 6 Cranch 87.

It is not necessary to dwell on the power and duty of the judiciary to inquire into the constitutionality of the acts of the general assembly, when a proper occasion occurs. 1 Kent 450. The relative position of the co-ordinate branches is generally well understood and readily conceded. But in the argument of this cause great stress

is laid on the practical construction which, in the case at bar, the general assembly has given to the constitution—and the same argument is pressed in other cases—as though it were presumption in the courts, composed of few members, to question the correctness of so numerous a body. Were such a doctrine admitted, all constitutional questions must begin and end with the legislature; for the argument would be equally applicable and equally conclusive in every case that might arise.

And yet there are considerations which might somewhat abate this blind respect for legislative exposition. Where the constitutional provision is restrictive of legislative authority, the construction given by the legislature, sitting in judgment on the extent of its own powers, could not be entitled to much weight. "To admit such an exposition as binding," says a late writer, "would be to permit the department restricted to do away with the very restriction imposed." Smith's Comm. 441. Under our political economy and written constitution, *Blackstone's* omnipotence of parliament is comparatively an empty figure of speech. *Marbury* v. *Madison*, 1 Cranch 137.—1 Kent's Comm. 426. The general assembly is a mere agent of the people intrusted with certain delegated powers. The constitution is the letter of agency. In its action the assembly is governed *sub modo* by the same rules as other agents: whenever it transcends its authority, its acts are void.

When we further reflect on the manner in which important enactments are often passed through the forms of legislation, it would seem that our respect for the construction of the constitution impliedly given by such acts, might be profitably qualified. If, for instance, it appears from the journals, which are the records of the general assembly, that the constitutionality of the act had not been considered, such a tacit interpretation of the constitution, even by so numerous and respectable a body, could scarcely be considered of much weight, or pressed upon us as authority. Thus, in the present instance, bill no. 142 of the house, which subsequently became the act

Nov. Term, 1853.

MAIER v. THE STATE.

of *March* 4, 1853, does not appear to have been referred to the judiciary committee of either house. The question of its constitutionality was not even agitated.

Where the chain of legislative decision is not continuous, it detracts very much from its authority. A series of interpretations by different assemblies to the same effect, acquiesced in and acted upon for considerable time, would be entitled to serious consideration. But this looking to what has been decided, a feature so beneficial in the courts, is rare in the legislature. For very obvious reasons the principle which may have been partially established by previous assemblies, is not regarded as binding. Hence, there is not that uniformity and accumulated weight of authority, which, on almost all topics, obtain in judicial decisions. Even the two sessions held under the new constitution, have not tended to fortify legislative construction. In accordance with the views just suggested, the second assembly has shown its independence of the first. What was unconstitutional in the one, was constitutional in the other. The action of the first was not respected as authority by the second.

Thus, the acts embodied in chapters 11, 21, 22, 55, 59, 89, 90, 91, 96, 97, 108, &c., of the laws of 1853, were passed without seemingly a constitutional scruple. Yet most of these acts had in principle been decided by the previous assembly, almost *nem. con.*, as clearly unconstitutional. These enactments are referred to, to illustrate the fickleness of legislative construction on constitutional questions, without intimating any opinion on statutes not judicially before us. Legislative constructions thus opposed to each other, hardly deserve to be quoted as authority. If there is any preponderance, it would seem to be with that which was more nearly contemporaneous with the constitution.

The first, second and third sections of the act of *March*, 1853, provide for taking a vote by townships, annually, at the *April* election, on the license question; and that without the consent of a majority of the legal voters of the proper township "for license," none can issue. In

connection with the affirmative vote, a bond is also required. The 19th section expressly repeals all other laws on the subject of retailing spirituous liquors. The 20th section declares an emergency, and that the act take effect and be in force from and after its passage and publication. It was published on the 19th of *March*, 1853.

Several constitutional provisions are referred to, with either the letter or spirit of which, it is contended, the act of *March* 4, 1853, conflicts.

Thus—

"The legislative authority of the state shall be vested in the general assembly, which shall consist of a Senate and House of Representatives." Sec. 1, art. 4.

No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution. Sec. 25, art. 1.

Local laws for the punishment of offenders and for the regulation of county and township business, are expressly forbidden. Sec. 22, art. 4.

"Whenever a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Sec. 23, art. 4.

These provisions are all in the nature of restrictions on the legislative authority. A legislative construction of them falls within the rule above indicated.

The evil to be remedied by sections 22 and 23, above quoted, was the local and special legislation so prevalent under the old system. It had grown into such magnitude that counties, townships, and even school and road districts, had special laws for the management of their local affairs.

The practice of submitting enactments on vexed questions to the popular vote, had obtained to some extent under the old constitution—whether consistently with even that instrument is not for us to inquire. Such was the school law approved *January*, 1849. Such, also, were several license laws embracing more or less territory. The legislature had thus, in some measure, ceased to be a representative body, and was gradually becoming a

Nov. Term, 1853.

MAIZE v. THE STATE.

mere proposer of laws for the consideration and final action of the people.

To remedy these evils—to restore the state from being a coterie of small independencies, with a body of local laws, like so many counties palatine, to what she should be, and was intended to be, a unity, governed throughout her borders on all subjects of common interest, by the same laws, general and uniform in their operation—the restrictions in sections 22 and 23 were embodied in the constitution.

By the adoption of that instrument, both the honor and the responsibility of passing general laws were devolved on the general assembly. Hence, the idea of any other power to make, sanction, or suspend the laws, or to give them effect, is necessarily excluded.

Let us inquire whether the taking effect of the act of *March*, 1853, in whole or in part, is made to depend upon any authority unknown to the constitution.

The words "take effect," "be in force," "go into operation," &c., have been used interchangeably ever since the organization of the state. The "operation of the laws," as used in the 26th sec., art. 1, seems to be their taking effect and continuing in force.

The act in question consists of two parts;—the one points out the mode of obtaining license;—the other prescribes the punishment for selling without license. The penal part of the act went into operation immediately upon publication. The provision for license did not. Between the 19th of *March* and the *April* election, no license could issue in any part of the state; the bond and the affirmative vote of the township being both essential. Had the people of each township voted "no license," there would have been no operative license law in the state for one year from *April*, 1853. And had the people so voted every year for all time to come, that part of the act relating to license could never have had any force, effect or operation as a law. So that the taking effect of the act, or so much of it at least as provided for the issue of license—in other words, whether there should be any

power to issue license—was made to depend on the vote of the people of each township.

If the townships vote diversely, as it is understood they have, then, in practical operation, it is a local law. In the townships which vote "license," the license feature takes effect by virtue of that vote. In the townships voting "no license," it has no force or operation in consequence of such vote. Thus has the general assembly merely proposed the license feature to the people, for them to give it vitality or reject it by townships.

It seems needless further to inquire whether the act in question is general and uniform in its operation. A law expressly providing for license in this township and no license in that, by name, and so on alternately throughout the state, would not, in its operation, essentially differ from this. Had the question been submitted to a vote of the state at large, the license feature, whether adopted or rejected, would have, at least, had the recommendation of uniformity. Besides, such an act, it is presumed, would not have had plausibility enough to mislead any one into the belief that it was constitutional. But this act is a specious and accommodating refinement on local legislation—ingeniously comprehensive—annually presenting to the townships an aspect suited to the taste of each.

In some respects, there is a very strong similarity between the school law of 1849 and the liquor act of 1853. If "county" be substituted for "township," the two acts are scarcely to be distinguished, in this, that their taking effect is made to depend on the action of the people in their primary capacity. The school law like the liquor law, was declared in force from and after its publication. Yet the same section provides that it should be left to the popular vote of each county. It is believed that *Montgomery*, *Sullivan*, and some other counties, never adopted the school law, so that practically it remained a local law, made so, like the license act, by a contingency over which the legislature had no control.

Many legislative acts, though declared in force from their passage, are inoperative until the officers charged

Nov. Term, 1853.

MAIZE v. THE STATE.

with their execution are elected or appointed. But those are easily distinguishable from the school law of 1849 and the license act of 1853. In such elections the question is, who shall be designated to execute the law—not as here, shall the law be permitted to go into operation—shall any one be suffered, on any terms, to execute it or act under it.

Nor is it easy to see how, on principle, a public measure can be submitted, in the abstract, to a popular vote, consistently with the representative system. In effect it is changing the government to what publicists call a pure democracy, such as *Athens* was. If one enactment may be submitted to such vote so may another, so might all: thus would the representative system be wholly subverted.

If the people desire to resume directly the law-making power which they have delegated to the general assembly, they have only to change the constitution accordingly.

Again, if this system of drafting bills with a double aspect, leaving it to the people which they will adopt, is to prevail, of what use is the constitutional provision requiring the yeas and nays on the final passage? If the object of this provision was to subject the action of the representative to the inspection of his constituents, it is thus completely evaded. For the vote, whether yea or nay, means nothing, indicates nothing; neither adopts nor rejects any policy, except that it ingeniously shifts the responsibility of final action from the legislature to the people.

If we regard the act of *March*, 1853, in force from its passage, as is claimed in argument, then we conceive it to be in conflict with sec. 26 of art. 1. That section reads, "The operation of the laws shall never be suspended, except by authority of the general assembly." An illustration of the exercise of this power occurs in chapter 1, Special and Local acts 1852, entitled, "an act to suspend" certain acts therein named. That the operation of the act of *March*, 1853, was left to be suspended

or otherwise, according to the vote of each township, is so evident as to need only to be stated. The township which this year votes "license," and thus puts the law into operation, may next year vote "no license," and thus suspend its operation. Under the constitution, the legislature alone can suspend the operation of the laws. And this power is not distinguishable from any other legislative power. It cannot be delegated. The suspending act is itself a law, and must emanate from the law-making power—specifying the act suspended, and, perhaps, the period of suspension. An existing law is a rule of action, open to every citizen to comply with its requisitions. But in case of a negative vote, there is no law left to be complied with. As to that township, it has no effect or operation. It is suspended.

As a license law, the act is complete in itself, without the part relating to the township vote. So much as relates to that vote may be considered as stricken out; and the license issues on filing the requisite bond. *Maize* having sold without such license, was properly convicted. He was bound at his peril to know the law, in violation of which he assumed to act.

Per Curiam.—The judgment is affirmed with costs.

J. Pettit and *W. F. Lane*, for the appellant.

L. Reilly, *G. S. Orth*, *E. H. Brackett*, *R. A. Riley*, *N. B. Taylor* and *J. Coburn*, for the state.

(1) *Ante*, p. 264.

THE STATE on the relation of CHAPMAN *v.* LINES and Others.

A sheriff, when he accepts the office, contracts that he will faithfully discharge every duty required of him by law, and for the omission of any duty enjoined by law, from which damages follow, he will be held responsible.

Nov. Term, 1853.

THE STATE v. LINES.

The steps to be taken by a sheriff, on the sale of real estate upon execution, are distinctly pointed out, and for a failure to pursue them, whether from a corrupt intention or neglect, he is liable to the injured party.

It is the duty of the sheriff, on a sale of land upon execution, to make and tender a deed to the purchaser, and the latter is not bound to part with his money until the deed is tendered.

Where the sheriff not having tendered a deed to the purchaser, has, for an omission of the latter to pay the purchase-money, sold the land for a smaller sum to another person, the first purchaser is released from his bid, and is not liable to pay the difference between the first and second sales.

The sheriff, under such circumstances, is liable to the execution-defendant for the amount of the difference between the two sales.

Tuesday, November 29.

ERROR to the *Fayette* Circuit Court.

DAVISON, J.—Debt against a sheriff and his sureties on his official bond. The bond was conditioned in the usual form for the faithful discharge of his duties as sheriff, &c.

The declaration alleges that one *Harwood*, at the *September* term, 1838, recovered a judgment in the *Fayette* Circuit Court, against one *Williams* and the relator, for 1,114 dollars, &c.; that a writ of execution was issued on this judgment and delivered to *Lines*, the sheriff, who levied it on the real estate of the relator; that this writ was returned "no sale for want of bidders;" that a *venditioni exponas*, founded on said levy, was afterwards issued to said sheriff, upon which the land levied on was sold; that the sheriff, upon said *vendi.*, made return "that he had publicly sold the land to *John Williams* for 1,250 dollars, and that the money remained unpaid, wherefore he returned said writ unsatisfied;" that afterwards an *alias vendi.*, founded upon the same levy, was issued and delivered to the sheriff, who made return thereon "that he had sold said land to *Martin M. Ray* for 400 dollars, and that the balance of the execution was unsatisfied;" that said balance has been fully paid, &c., and the land sold was the relator's property.

There were three breaches assigned.

1. That *Lines*, the sheriff, did not faithfully discharge his duties, &c., in this, that on the sale of the land to *Williams* for 1,250 dollars, he failed, neglected and refused to execute and tender to said *Williams* a proper

deed to the land, and to demand of him the 1,250 dollars; whereby the sale became lost and *Williams* was released from his bid, and the difference of 850 dollars between the sale to *Ray* and the sale to *Williams* became and was entirely lost to the relator.

2. That said sheriff, on the sale of the land to *Williams*, failed and neglected to execute and tender to him a deed to the land and demand the purchase-money, and thereby, on his failure to pay the money and the subsequent sale of the land to *Ray*, the said *Williams* became and was released from paying on said judgment 850 dollars, the amount he bid for the land more than it was sold for to *Ray*.

3. That the sheriff fraudulently released *Williams* from his purchase and his bid of 1,250 dollars, and from said 850 dollars, with 10 per cent. thereon, and cost of the sale to *Ray*—the said 850 dollars being the amount *Williams* bid for the land more than it was sold for to *Ray*.

The defendants obtained oyer, &c., and pleaded eight pleas. In the decision of this cause it will be only requisite to notice the fifth and seventh pleas.

The fifth plea is to the first and second breaches. It alleges that the sheriff did not refuse to make and tender a deed to *Williams* in manner and form as alleged, &c.

The seventh plea is to the third breach—that *Lines*, the sheriff, did not fraudulently release *Williams* from his bid and purchase, &c.

These pleas conclude to the country.

The plaintiff demurred to the fifth plea, and the demurrer was overruled. The cause was submitted. Verdict for the defendants, and judgment on the verdict.

The record shows that the plaintiff moved the Court to instruct the jury, "that if the sheriff, in the sale to *Williams*, failed to make and tender to him a deed of the land, and afterwards sold it to *Ray* for a less sum, whereby *Williams* became released from his bid, the jury should find for the plaintiff the difference between the two bids." This instruction the Court refused, but instructed the jury, *inter alia*, as follows: "If *Lines*, the sheriff, in good faith

Nov. Term, 1853.

THE STATE v. LINES.

returned the execution, with the facts—believing that he had done all that was necessary under the law, and not deeming it necessary to tender a deed until the money was paid or tendered—such facts would not sustain the plaintiff's action; but if he fraudulently, with intent to release *Williams* from his bid, failed to tender him a deed, and sold the land for a less sum, whereby he was released from his bid, the jury should find for the plaintiff the difference between the two sales."

From the evidence, it appears that the relator's land was sold on execution by the sheriff for 1,250 dollars; that he failed to make and tender a deed to *Williams*, the purchaser, and the same land was again exposed and sold to *Ray* for 400 dollars. After this, the sheriff filed his motion in the Circuit Court for the recovery of 850 dollars, the difference between the sales. This motion was unsuccessful, on the ground that he had not made and tendered a deed. See *Williams* v. *Lines*, 7 Blackf. 46.

There is, then, only one question presented by the record: Did the failure of the sheriff to make and tender a deed render him liable in this action?

It is contended "that under our statutes a sheriff cannot be made liable, unless he acts corruptly, for failing to tender a deed to a bidder for property sold on execution;" "that it is trusted to him what steps to take." This position is not well taken. When a sheriff accepts the office, he contracts that he will faithfully discharge its duties. This plainly embraces every duty required of him by law. It follows that when he omits an act of duty enjoined by virtue of his office, he is guilty of a breach of his contract, and will be held responsible should damages result from such breach. 9 Johns. R. 381.—6 Blackf. 444.—*Ford* v. *Godbold*, 2 Strobh. S. C. 109.

Upon the sale of real estate on execution, there is nothing left to the sheriff's discretion. The steps to be taken by him are distinctly pointed out. If he fails to take them, he will be liable to the party injured thereby, whether such failure be the result of a corrupt intention or a mere neglect of duty. The sheriff, upon such sale,

is required to make and tender a deed to his vendee. This duty is purely ministerial, and he may not omit its performance. The delivery of such deed and the payment of the purchase-money are to be concurrent acts. The vendee is not bound to part with his money until a deed for the premises is tendered. 8 Blackf. 105.—7 *id.* 46.—8 Johns. R. 520.

In the case before us, no deed was offered to *Williams*, the first vendee of the land; but the sheriff afterwards sold and conveyed it to *Ray*. Therefore *Williams* was not only released from his bid, but his liability to pay the difference between the first and second sales. By that release, the relator evidently lost 850 dollars. What caused this loss? To this question there is but one answer, viz., the sheriff's failure to tender a deed and demand the 1,250 dollars. *Williams* v. *Lines*, *supra*.

From this view we are of opinion that the second breach is well assigned; that the demurrer to the fifth plea should have been sustained, because it constitutes no answer to the breach; that the instructions moved by the plaintiff should have been given; and that the charge of the Court was erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test and *J. A. Fay*, for the state.

S. W. Parker and *J. S. Newman*, for the defendants.

Babbitt *v.* Doe on the demise of Brush and Others.

An order for the sale of real estate upon an administrator's petition for the non-payment of debts, is a nullity, where it appears by the record that the heirs did not receive actual or constructive notice of the suit; and a sale under such an order is void.

Nov. Term, 1853.

BABBITT v. DOE.

The sale not being merely erroneous but void, ejectment will lie against the purchaser, without any proceeding to reverse the order.

The term "competent jurisdiction," as employed in s. 27, c. 29, R. S. 1843, means jurisdiction of the person as well as of the subject-matter.

That section only operates prospectively.

Tuesday, November 29.

ERROR to the *Franklin* Circuit Court.

DAVISON, J.—Ejectment for a tract of land in *Franklin* county. The cause was submitted to the Court. Judgment was given for the plaintiff below.

Upon the trial it was shown that *Edward Brush*, on the 11th of *August*, 1826, died seized of the premises in dispute, leaving *Ann Brush*, his widow, and the following named children and heirs at law, viz., *Elma Brush*, *Shadrach Brush*, *Rebecca Brush*, *Joseph Brush*, and *Mary Brush*, who, with *John L. Hoyt*, the husband of the said *Rebecca*, are the plaintiff's lessors. At the death of their father the said heirs were all minors, the oldest of them not more than twelve years of age. Within a short period after the death of *Edward Brush*, his widow and children removed to the state of *Connecticut*, where they have ever since resided.

The plaintiff having proved that the defendant was in possession of said premises, rested.

The defendant claimed title under a deed made by *Andrew S. Babbitt*, administrator of the decedent, pursuant to an order of the *Franklin* Circuit Court. The records of that Court show that at the *March* term, 1827, the administrator appeared and filed an inventory of the real estate of said deceased, and thereupon suggested the insufficiency of the assets then in his hands to pay the debts against the estate; whereupon the Court appointed one *Reuben Edgerton*, guardian *ad litem* for said minor heirs, and ordered its clerk to issue a summons requiring him to appear for them at the next term of the Court, and show cause, if any he could, why the land in the inventory described should not be sold, &c. The clerk was authorized to insert in the summons the respective names of said minor heirs, when known, &c. This sum-

mons was accordingly issued, and served upon the said *Edgerton*.

The records further show that at the *September* term, 1827, the administrator appeared; but *Edgerton*, the guardian, although called, did not appear. And thereupon, the Court ordered the administrator to sell the land, on a credit of nine months, upon giving notice, &c., and that he give bond, &c. At the *March* term, 1828, the administrator made report, stating, *inter alia*, that he had sold the land to one *John Maple* for 226 dollars, that being the highest bid, &c. The Court approved the sale, and ordered the administrator, upon the payment of the purchase-money, to convey the land to *Maple*. The defendant gave in evidence a deed from said administrator to *Maple* for the land, being the same now in dispute; and also a deed in fee for the premises to himself from the said *Maple*. It was then proved that the decedent's heirs, at the time of the proceedings in the Circuit Court relative to said sale, were minors and non-residents. There was also evidence tending to show that they had no notice of the suit. Nor does it appear that the person appointed guardian *ad litem* ever acted as such, or even accepted the appointment.

The record, given in evidence in the cause, shows the proceedings of a Court possessing general powers; but it contains no averment on the subject of notice to the defendants. Then, the point of inquiry is, were they bound by the order directing the sale of the premises? It is conceded that the cause of action was properly before the Court; but contended that the infant heirs had no notice of the suit in which that order was made; and that, therefore, it was a nullity. Infants should be served with process, or notified in the same mode as if they had been adults. 8 Blackf. 301. Without notice or appearance, they are not within the jurisdiction of the Court. And we believe the principle to be correct, "that the judgments of all courts are void, unless they have jurisdiction of the parties as well as the cause." *Hollingsworth* v. *Barbour*, 4 Peters 466. To bind a party by a judgment

Nov. Term, 1853.

BABBITT v. DOE.

when he had no notice of the action, would be in conflict with the first principles of justice. 5 Johns. R. 38. The plaintiff contends that the validity of the order cannot be questioned in this suit: that it is erroneous, merely, and the only mode in which it could be avoided, is by a proceeding in error. We are not of that opinion. It is true, "when the record given in evidence discloses nothing on the point, jurisdiction of the person will be presumed." 1 Ind. R. 130. But it seems to us that the record in question, upon its face, shows that the proper steps had not been taken to bring the defendants within the jurisdiction of the Court. When the appointment of a guardian *ad litem* was made, the names of the infants were unknown to the Court. This is shown by the order directing the clerk to insert their names, when known, in the summons. It would involve an absurdity to presume that they were present in Court as suitors, or notified of the proceeding in any mode known to the law, when the Court and its officers were ignorant of their names. Against such evidence, presented by the record itself, we cannot indulge the presumption that the Court had jurisdiction of the parties. A different conclusion would assume the untenable position that a Court might take cognizance of an individual not within its jurisdiction, and bind him by a judgment without notice of suit. In *Bloom* v. *Burdick*, 1 Hill 130, it was ruled, that if the want of jurisdiction appears on the record, the judgments of all courts are void, without reference to the nature or extent of the powers intrusted to them for administration. The same doctrine is held in *Denning* v. *Corwin*, 11 Wend. 648. These decisions are cited and approved in a late case in the Supreme Court of the *United States*. In that case it was decided that a judgment was a nullity where it appeared in the proceedings that no regular process, either actual or constructive, had been served on the defendant. *Harris* v. *Hardeman*, 14 Howard U. S. R. 334.

The present case, in our opinion, is clearly within the rule just stated. Therefore, it follows that the order directing the sale of the premises in controversy, is void

and the deed pursuant to it inoperative. *Lincoln* v. *Tower*, 2 McLean 473.

We are referred to a statute which provides that if the validity of a sale by an administrator, &c., shall come in question, it shall not be avoided on account of any irregularity or defect of the proceedings, if it shall be made to appear, 1. That the sale was authorized by a court of competent jurisdiction. 2. That the administrator, &c., took the oath and gave bond. 3. That notice of the time and place of sale was given. 4. That the premises were sold accordingly, &c. R. S. 1843, c. 29, s. 27. It is insisted that these requisitions have, in this case, been complied with; that the first contemplates a sale directed by a Court having jurisdiction of the subject-matter, and not of the parties. This is not a proper construction of the statute. The terms "competent jurisdiction," in their usual signification, embrace the person as well as the cause. The legislature could not have intended to empower courts to direct a sale which would divest an individual of title to property without the proper notice of suit. But the statute referred to is prospective in its operation, and, therefore, not applicable to the case before us.

The defence set up in this case is not, in our opinion, sufficient to bar the action.

Per Curiam.—The judgment is affirmed with costs.

G. Holland, for the plaintiff.

J. Ryman, for the defendant.

Conwell and Another *v.* Smith.

Trespass against six defendants. The writ was served on three of them, and as to the others, was returned "not found," but the return was not suggested upon the record. After the plaintiff had closed his testimony,

Nov. Term, 1853.

CONWELL v. SMITH.

the defendants served with process introduced the defendants not served, and proposed to swear them as witnesses. The plaintiff objected, and while the objection was under discussion, caused another writ to be issued in the cause, and to be served on the defendants who had not been served. *Held*, that, as to the defendants on whom the process had not been served before the commencement of the trial, the writ had abated, and they were no longer parties to the action. *Held*, also, that they were competent witnesses.

When the writ was returned "not found" as to a portion of the defendants, two courses were, under the R. S. 1843, open to the plaintiff: he might continue the cause till all the defendants were brought into Court, or suggest the return of "not found" upon the record, and proceed to trial against those served.

If the plaintiff adopted the latter course, he might afterward proceed by action against those "not found," jointly or severally.

Wednesday, November 30.

APPEAL from the *Franklin* Circuit Court.

ROACHE, J.—This was an action of trespass *vi et armis*, brought by *Smith* against *Conwell*, *Fingland*, *Shoup*, *Updegraff*, *Tilney*, and *Hoskins*. The writ was served on the three former; as to the three latter, the sheriff returned "not found."

Conwell, *Fingland* and *Shoup*, who were served with the process, appeared and plead to the action. Issues were made up on their pleas, and the parties went into trial. There was no suggestion of "not found" entered on the record as to *Updegraff*, *Tilney* and *Hoskins*.

After the plaintiff had closed his testimony, the defendants introduced *Updegraff*, *Tilney* and *Hoskins*, and prepared to swear them as witnesses. The plaintiff objected, and while his objection was under discussion, caused another writ to be issued in the cause, and to be served by the sheriff on the three who had not been served with process. The evidence had tended to show the participation of *Updegraff*, *Tilney* and *Hoskins* in the commission of the trespass.

The Court sustained the objection, and excluded the witnesses.

There was a verdict and judgment against *Conwell* and *Fingland* for 325 dollars, and against *Shoup* for one cent.

The two former bring the case to this Court.

When the writ is returned "not found" as to a portion

of the defendants, two courses are open to the plaintiff. He may continue the cause till all the defendants are brought into Court, or he may, at his option, under the provisions of s. 31, p. 675, R. S. 1843, suggest the return of "not found" on the record, and proceed to trial against those served.

If he adopt the latter, he may afterwards proceed by action against those "not found," jointly or severally.

In the case at bar, the plaintiff did neither; and the proceeding was consequently irregular.

The effect of his going into trial under such circumstances, is, that as to those on whom the process had not been served, the writ abated. In the language of the opinion of the Court in *Palmer* v. *Crosby*, 1 Blackf. 139, "they were no more parties to the action than if their names had not been in the writ." See, also, to the same point, *Purviance* v. *Dryden*, 3 S. & R. 402.—*Gibbs* v. *Bryant*, 1 Pick. 118.—*Glidewell* v. *McGaughey*, 2 Blackf. 359. The result of these authorities is, that the witnesses were not, when introduced, any longer parties to the action, and not incompetent on that account. 3 Stark. Ev. 1063.—*Ward* v. *Haydon et al.*, 2 Esp. C. 552. The current of authorities is, that under such circumstances they had no such an interest in the event of the suit as would exclude them. It is too remote and contingent. The old rule was otherwise. But the modern decisions, both in *England* and the *United States*, establish this position. The objection only goes to the credit of the witness. *Alderman* v. *Tirrell*, 8 Johns. R. 418.—*Stockham* v. *Jones*, 10 *id.* 21.—*Wakely* v. *Hart*, 6 Binn. 316.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. Holland and *J. D. Howland*, for the plaintiffs.

J. Ryman, for the defendant.

Nov. Term, 1853.

THE STATE BANK v. MACY.

THE STATE BANK and Others *v.* MACY and Others.

Lands conveyed to a trustee to be sold and the proceeds accounted for, were, under the R. S. 1843, liable to levy and sale upon execution on a judgment against the *cestui que trust*.

A. being a part-owner of a tract of land, conveyed it to *B.*, to be sold by him at public auction with the residue of the tract. *A.*, at the sale, bought the whole tract, and received a title-bond from *B.* therefor. *Held*, that *A.* acquired the same title which a stranger would have acquired. *Held*, also, that his interest being that of the obligee of a title-bond, was not subject to execution.

Bill to enjoin the sheriff from levying upon and selling certain land because it was not the property of the judgment-defendant but that of third persons. *Held*, that the penalty and condition of the bond were to be regulated by s. 133, c. 46, R. S. 1843.

Wednesday, November 30.

ERROR to the *Wayne* Circuit Court.

ROACHE, J.—This was a bill in chancery filed by the defendants in error, *Jonathan W. Macy*, administrator of *Daniel Sinks*, deceased, and *Jeremiah W. Swafford*, *Wilson Jones* and *Jacob Kimmel*, praying for an injunction to restrain the *State Bank of Indiana* and *William Baker*, the sheriff of *Wayne* county, from proceeding to sell certain real estate levied on by said *Baker*, on an execution issued on a judgment in favor of the bank.

The injunction was granted in vacation by the president judge. At the next term, the defendants below demurred to the bill, and the demurrer was overruled. They then made a motion to dissolve the injunction, which was also overruled, and the defendants declining to answer or make any further defence, the injunction was made perpetual.

The material facts, as disclosed by the bill, are as follows:

Jacob Sinks was seized in fee of the undivided one-half of certain real estate; but supposing himself to be seized of the whole, on the 18th day of *April*, 1844, made his will, by which he devised the whole to the said *Macy*, *Charles H. Moore* and *Robert Murphy*, his executors, directing them to sell the same on such terms and at such

time as they should think best, and to divide the proceeds of such sale, as follows: one-sixth part to *Mary Sinks*, his widow, and the remainder to his six children in equal portions, the said *Daniel Sinks*, deceased, being one of the six children.

Jacob Sinks died on the 1st day of *November*, 1846, and on the 24th day of the same month, letters testamentary were granted to said *Macy*, *Murphy* and *Moore*.

Mary Sinks, the widow of said *Jacob*, was seized in fee in her own right, of the undivided one-half of the said real estate, of the whole of which her said husband supposed himself to be the owner, and being so seized, died on the day following her husband's decease, leaving the same children and heirs to her estate left by her husband.

After the death of said *Mary Sinks*, on the 23d day of *November*, 1846, all the adult heirs, for the purpose of enabling the executors to sell the entire title in said real estate, joined in making a deed in fee simple to said executors, for the undivided half thereof which had descended to them as heirs of *Mary Sinks*, their mother, in trust, to be by them sold, and the proceeds distributed in the manner prescribed by *Jacob Sinks's* will.

On the 10th day of *March*, 1847, the executors accordingly sold said real estate, at public sale, to the said *Daniel Sinks* (one of the six children and heirs of the testator) for 8,015 dollars, and gave him a title-bond for a conveyance, to be made on full payment of the purchase-money.

Said *Daniel*, prior to his death, paid 4,000 dollars of the purchase-money to the executors, leaving the balance unpaid at the time of his death, which occurred on the 25th day of *November*, 1849. On the 11th day of *December*, 1849, letters of administration were granted on his estate to the said *Macy*. The administrator filed in the *Wayne* Probate Court his petition, alleging the insolvency of the estate of *Daniel Sinks*, and such proceedings were had in said Court on such petition, that on the 12th day of *March*, 1850, he sold said real estate to the complainants, *Swaf-*

Nov. Term, 1853.

THE STATE BANK v. MACY.

ford, *Jones* and *Kimmel* for 6,600 dollars, on the terms prescribed by the Probate Court, to-wit, one-third cash down, and the balance in two equal instalments of nine and eighteen months. The purchasers complied with the terms of the sale.

On the 28th day of *August*, 1848, the *State Bank of Indiana* recovered a judgment in the *Wayne* Circuit Court against the said *Daniel Sinks* and others for 1,618 dollars and 8 cents, upon which an execution issued on the 5th day of *November*, 1849, by virtue of which, *Baker*, the sheriff of said county, on the 5th day of *October*, 1850, levied on the interest of *Daniel Sinks* in the said real estate, and advertised the same to be sold on the 2d day of *November*, 1850. That the bank insists that the said *Daniel* was seized of the undivided one-sixth part of said real estate at the time of the rendition of her judgment against him, and that it was subject to sale under the said execution. That the complainants, *Jones*, *Swafford* and *Kimmel* were ready to pay the balance of the purchase-money so soon as the questions affecting the title could be settled.

Prayer for an injunction.

The will of *Jacob Sinks*, deed of trust, and some other documents not necessary to be mentioned here, were made exhibits.

As there was no answer or evidence, the case stands on the bill and accompanying exhibits. The question they raise for consideration is, Had *Daniel Sinks* an interest in said real estate at the date of the rendition of the judgment in favor of the *State Bank*, and of the levy of the execution, subject to be seized and sold on such execution? In other words, What was the nature and extent of the interest of *Daniel Sinks* in the said real estate from the 28th of *August*, 1848, the date of the rendition of the judgment of the bank, to the 5th day of *October*, 1850, the date of the levy of the execution?

By the death of his mother, *Mary Sinks*, he became the owner in fee, by descent, of the undivided one-twelfth part of the real estate. On the 23d of *November*, 1846, he conveyed all his interest in the land to trustees, in

trust, to convert the realty into money, and account for the proceeds. From anything appearing in the record, he had at that time an unquestionable right, as against the bank, to make such conveyance.

This, however, left in him an estate which was subject to levy and sale on execution. R. S. 1843, p. 453, ss. 1 and 2. That estate remained in him until the 10th of *March*, 1847, when the trustees, who were also the executors, made a sale of the land in pursuance of the deed of trust.

Did the fact that *Daniel Sinks* was the purchaser, change the legal effect of the sale? If the sale had been made to a third person, it would have divested *Daniel Sinks* of any title he had previously held in the land, and converted it into an interest in its proceeds alone. The trustees, in whom the legal title still continued, would have held it in trust, not for *Daniel Sinks*, but for such purchaser. The sale would have been an execution of the trust, the contemplated and necessary consequence of which was the divesting of the entire interest of the *cestui que trust*. *Daniel Sinks* would then, from the date of such sale, have had no interest in the land subject to execution.

It remains to be considered, whether the *cestui que trust*, who himself becomes the purchaser, acquires a title different from that which would be acquired by a stranger under such sale. He bought at public auction, entering into competition with all other bidders, and was required to, and did comply with all the terms of the sale, and received a title-bond for a conveyance upon full payment, precisely as a stranger would have done. It would seem to follow as an inevitable consequence, that he acquired the same title and right which a stranger would have acquired. We can perceive no distinction between the cases. His interest in the land ceased to be that which had descended to him from his mother. That had been divested by the sale made by the trustees in pursuance of the deed of trust. By that sale he acquired a new and different interest, derived alone from his purchase from

Nov. Term, 1853.

THE STATE BANK v. MACY.

the trustees. That was the equitable interest of the obligee of a title-bond, the obligor holding the legal estate, subject to his equitable right to a conveyance upon full payment. Such an interest was not subject to execution. *Modisett* v. *Johnson*, 2 Blackf. 431.

We have therefore come to the conclusion that *Daniel Sinks* had not such an interest in that portion of the real estate which descended to him from his mother, *Mary Sinks*, as to entitle the bank to levy her execution upon it.

It is also contended that the will of *Jacob Sinks* did not vest the fee of his real estate in his executors, but only contained a direction to them to sell, and that consequently, the one undivided sixth of his half thereof, or one-twelfth of the whole, vested by descent in said *Daniel*.

It is unnecessary to examine this point, as its decision cannot in any way affect the decision of the cause.

By his deed of trust, said *Daniel* conveyed all his interest whatever in the real estate to the trustees. If the provision of the will was a devise of the fee to the executors, of course he never had any interest in that twelfth. If it was not, and the fee descended, the reasoning as to the interest which he took as the heir of *Mary Sinks* is applicable, and shows that his leviable interest was divested before the rights of the bank accrued.

We have come to the conclusion, therefore, that *Daniel Sinks* had no interest in said real estate subject to levy and sale under the execution in favor of the bank, and that the Circuit Court, in making the injunction perpetual, was right.

Whether the bank might not, by her bill in chancery, have compelled the application, upon her judgment, of such an amount of the purchase-money due from *Swafford*, *Jones* and *Kimmel*, as corresponded to the interest which vested in said *Daniel* by descent, is not raised by the pleadings, and is not before us for consideration.

The plaintiffs in error urge the reversal of the decree below, on the further ground that the bond given by the defendants, who were the complainants below, on the granting of the injunction, is insufficient, both in the

amount of the penalty and the condition. It is not material to the decision of this case whether the bond was sufficient or not; for the decree of the Circuit Court being affirmed, the party can sustain no injury. But as the point was pressed by counsel, and may frequently arise in practice, it is deemed advisable to settle it.

The bond required by the judge on granting the injunction was in the penalty of 1,000 dollars, conditioned for the payment of all damages and costs, &c. This was in accordance with the requirements of s. 133, c. 46, R. S. 1843.

The plaintiff in error contends that the bond should have been in accordance with the provisions of s. 130 of the same chapter, which provides that—"No injunction shall be granted to stay proceedings after judgment, in any personal action, unless the complainant shall file bond in the proper clerk's office, with surety to be approved by the court, judge or judges, granting the injunction, in a penalty sufficient to secure the payment of such judgment, interest and costs, and also the damages and costs which may be awarded by the court, if the injunction be dissolved," &c.

Section 133, under which the bond was filed, prescribes that "in all other cases not specified in the preceding sections, the party obtaining an injunction shall give bond to the adverse party affected thereby, with sureties, and in such penalty as may be required and approved by the court, judge or judges allowing the same, with condition for the payment of all damages and costs which may accrue by reason of such injunction."

Section 130 was manifestly intended to embrace those cases where it is sought to stay some process taken by the party for the enforcement of the judgment. The complainants in the present case ask for no stay of process. They do not ask to have the execution suspended. They only seek to prevent the levy of the execution on property not subject to execution. It leaves the judgment intact and the plaintiff at liberty to resort to any legal process for its enforcement. The prayer is, that the

Nov. Term, 1853.

Cox v. O'Riley.

plaintiff shall be enjoined from levying upon and selling certain specified property, because it is not the property of the judgment-defendant, but the property of third persons. The effect of the injunction, when granted, is not to stay any legal "proceedings" for the enforcement of the judgment.

It was proper, therefore, that the penalty of the bond should be fixed by the judge granting the injunction, and that it should be conditioned for the payment of such damages and costs as should accrue by reason of such injunction.

Per Curiam.—The decree is affirmed with costs.

J. S. Newman and *J. P. Siddall*, for the plaintiffs.

J. B. Julian, for the defendants.

---

4 368
196 244

4 368
160 140

Cox and Others *v.* O'Riley and Another.

Wharfingers are not, like common carriers, answerable for all goods that may be intrusted to them, not lost by the act of God or the public enemy; but are only responsible for losses happening through failure to exercise reasonable and ordinary care and diligence; and they are, in this particular, in the same category with warehousemen.

In a suit against a wharfinger for the value of goods received by him as such and not delivered to the consignee, he must first prove that he has not the possession of the goods, to allow evidence that he exercised reasonable and ordinary diligence in preserving them.

It is the duty of the wharfinger to give direct and reasonably prompt notice to the consignee of the arrival of the goods, and he will not be excused from the consequences of a neglect to give the notice by the simple proof of his having notified a person in the employ of the consignee of the arrival, or by the consignee's having heard a rumor that the goods were in the wharfinger's possession.

A usage of trade may be proved to aid, in a case of doubt, in construing

a contract or determining upon the manner of discharging some duty or performing some act; but to give it any controlling effect it must be a long-continued, uniform, and generally known usage; and it must relate to matters of fact and not to a common belief as to what is the law.

A usage repugnant to well-established rules of law is not, in any case, admissible in evidence.

ERROR to the *Vanderburgh* Circuit Court.

Wednesday, November 30.

PERKINS, J.—Assumpsit by the plaintiffs against the defendants for the purpose of recovering from the latter the value of a box of goods which it is alleged they received as wharfingers, and negligently lost. Plea, non assumpsit. Trial by the Court without a jury, and judgment for the defendants. A motion for a new trial was overruled.

The evidence is upon the record; and from it, it appears that in *March*, 1851, the plaintiffs, *Cox, Robb, & Co.*, purchased of a mercantile house in *Cincinnati, Ohio*, a bill of goods exceeding 800 dollars in amount, which goods were to be forwarded to the store of said *Cox, Robb, & Co.*, at *Paris*, in *Posey* county, *Indiana*.

The goods were packed in four boxes and shipped on the 3d day of *April*, 1851, upon the steamboat *Bay State*, and consigned to *Cox, Robb & Co., Paris*, care of *Morgan* and *Keen, Evansville, Indiana*. *Paris* is situated some twenty-five miles from *Evansville*, in a north-westerly direction, and back from the river.

Morgan and *Keen* were wholesale merchants in *Evansville*, and the plaintiffs, *Cox, Robb, & Co.*, were customers of them, and, hence, took the liberty, without their consent or knowledge, of having the goods in question consigned to their care.

The defendants, *O'Riley* and *Mitchell*, were wharfingers and forwarding and commission-merchants at *Evansville*, and in the habit of receiving goods shipped to *Morgan* and *Keen*.

Three boxes of said goods arrived at *Evansville*, were discharged upon the wharf-boat of *Taylor* and *Harvey*, and received by *O'Riley* and *Mitchell*, the defendants, who, on the 21st of *April*, by their clerk, Mr. *Wheeler*,

Nov. Term, 1853.

Cox v. O'Riley.

presented the bill of lading of the four boxes named in it as having been shipped, at the store of said *Morgan* and *Keen*, and received from them the charges on said boxes for freight. *Morgan* and *Keen* did not have the goods removed from the boat, but suffered them to remain upon it till the next day, when the teams of *Cox, Robb, & Co.* arrived and received the three boxes for transportation to *Paris*, the fourth box being still missing.

Two or three days after this, the missing box was discharged upon the wharf-boat of *Taylor* and *Harvey*, being returned from *Paducah*, whither, by some agency, it had been taken. It was received by the defendants, *O'Riley* and *Mitchell*. Shortly afterwards it was missed again, and was unheard of for two weeks, at the end of which period it re-appeared at *Evansville*, from a trip upon the *Wabash*, and was placed upon the wharf-boat of the defendants. The clerk of said wharf-boat, soon after, informed "a lad" employed about the store of *Morgan* and *Keen*, but in what capacity does not appear, though it was proved that it was not his business to receive or deliver goods, that the missing box had arrived, and requested him to notify his employers of the fact; but he did not know whether the request was complied with. The box remained on the outer guard of the wharf-boat for five days. *Morgan* and *Keen*, within a day or two after its arrival, had information that the box was upon said boat, but from what source the information was derived is not shown. On one occasion, *O'Riley* directed a drayman to take said box to *Morgan* and *Keen*, and he promised to do so after he should have attended to a steamboat that was about landing at some point, not designated, in the port of *Evansville*. When he returned for the box he was unable to find it. It does not appear that he made any inquiry, but simply a search by himself for the box, which proved fruitless. The record discloses nothing further as to what became of it.

It was proved "that the practice on the wharf-boat of the defendants was, that 'town' freight was received by the defendants, but not stored on the wharf-boat unless

especially directed by the owner or consignee, in which case regular commissions at 1 dollar per ton were charged; that defendants advanced the freight on town freight, for which advances, and for the trouble of receiving the freight, defendants charged commissions, but nothing was charged for storage, the owners or consignees being advised immediately of the receipt of their freight at the wharf; and that after such notification, defendants did not consider themselves liable for the safety of freight; that frequently they notified the drayman of the owner or consignee of the arrival of the goods, and that the above mode as to town freight was the custom with the other forwarding and receiving merchants on the wharf; that in rainy weather town freight received by the defendants usually remained on the boat until the owner or consignee was informed of its arrival, but when the wharf-boat was filled with other freight, or the weather was good, town freight did not remain on the wharf-boat, but was rolled through it to the wharf, where it remained till removed by the owners; and that it was the custom of all the receiving merchants on the wharf not to send up the town freight by drays or otherwise, but to notify the owners of its arrival. That by town freight was meant such freight as was owned by or consigned to citizens of *Evansville*."

Such is the case made by the evidence.

Wharfingers are not, like common carriers, answerable for all goods that may be intrusted to them in their line of business, except such as may be lost by the act of God or the public enemy. They are responsible for losses only which happen through a neglect to exercise reasonable and ordinary care and diligence. They are in the same category, in this particular, with warehousemen. Story on Bailm., p. 451.—*Thomas* v. *The Boston and Providence R.R. Co.*, 10 Met. 472. Were it shown, then, by the evidence, that the box of goods in question, which is traced to the possession of the defendants as wharfingers, had actually passed out of their possession—been lost, in fact, from them—we should be called upon to determine whether it

Nov. Term, 1853.

Cox v. O'Riley.

had been so lost for the want of reasonable care on their part or not.

But the evidence does not show that it has passed from the possession of the defendants. It was last seen upon their wharf-boat, and they give no further account of it. For aught that appears, it may have been taken by them to their own house, and appropriated to their own use. It devolved upon them to show the box out of their possession. They might have proved that it had been consumed by fire, crushed and destroyed by other boxes, &c., thrown upon it, knocked into the river, or taken off by the hands of some other steamboat, &c.; and when such proof had been made, it would have devolved upon the plaintiffs to establish that the loss, however it might have happened, occurred for the want of reasonable care on the part of the defendants. But they must first clear themselves of the possession of the property. A rule of law that would permit a party to receive property, refuse to account for it, and be protected in the refusal by a presumption that it was lost, would work too great and too frequent injustice to be tolerated. In the case before us, one of the defendants points out the box in controversy to a drayman. It is then on his own boat, in his own custody. At a subsequent hour the drayman calls to receive the box, but it is missing. No attempt is now made by the defendants to account for its absence. It is not shown that any other steamboat had been receiving, in the meantime, goods from the wharf-boat on which the box was seen, and, hence, might have taken it, nor that any person had been upon the wharf-boat for any purpose. The naked facts simply appear, that the box is at one hour in the possession of the defendants, at another it is called for and not found, and from that time to the present remains unaccounted for. The rule that the party must prove the property to have been lost, may sometimes operate hardly on the bailee, but not so often as would the contrary work injustice to the owner.

But it is said that usage at *Evansville* absolves wharf-

ingers from liability for goods lost after notice to the consignee or owner, and that the defendants are brought by the evidence within the usage. If there be such a usage at *Evansville*, it cannot bear upon this suit, for it is not shown that after the return of the missing box from the *Wabash*, any notice was given to the consignees. The clerk of the wharf-boat requested a lad in their employ to notify them. Without further information about this lad, we cannot say he was an agent of the consignees to whom notice, binding on them, could be given; and the clerk of the wharf-boat did not so regard him, for he did not assume to give the notice to him as agent, but requested him, rather as agent of the clerk, to give the notice to *Morgan* and *Keen*. With this request there is no evidence that he complied. True, *Morgan* and *Keen* had information, by rumor or otherwise, that the box was at the wharf-boat; but they were not bound to act upon rumor, and the defendants cannot avail themselves of any such irregular, informal notice in excuse for their own neglect to give direct and reasonably prompt notice.

But no such usage as is contended for is proved. A usage of trade may be proved to aid, in a case of doubt, in construing a contract, or determining upon the manner of discharging some duty or performing some act; but to give it controlling effect, it must be shown to be a long continued, uniform, and generally known usage. It must also be a usage relating to matters of fact, and not to modes of thinking as to the law. In this case the proof is simply that the wharfingers, &c., at *Evansville*, after notice given, &c., were accustomed to consider themselves as not responsible. This amounts to nothing. A usage in conflict with plain, well-established rules of law, is not admissible in evidence in any case, and must be disregarded. We may be permitted to add the remark that were the courts, by their decisions, to encourage the growth of these local usages, originating generally in lax business practice or mistaken ideas of law, they might become as great an evil, a source of as much want of uniformity in the law, as was the local legislation of the

Nov. Term, 1853.

Doe v. Richards.

past—an evil supposed to be eradicated from our political system by the new constitution.

For cases illustrating the law as to proving usage and custom to aid in the construction of contracts, &c., see *Foye* v. *Leighton*, 2 Foster (N. H.) R. 71.—*Edie* v. *East India Company*, 2 Burrows 1216.—*Bowen* v. *Stoddard*, 10 Met. 375.—*Hone* v. *The Mutual Safety Insurance Company*, 1 Sandf. (N. Y.) R. 137.—*Beirne* v. *Dord*, 2 *id.* 89.—*Beals* v. *Terry*, *id.* 127.—*Suydam* v. *Clark*, *id.* 133.—*Webb* v. *National Fire Insurance Company*, *id.* 497.—*Read* v. *Gibbs*, 3 *id.* 203.—*Child* v. *Sun Mutual Insurance Company*, *id.* 26.—*Hawes* v. *Lawrence*, *id.* 193.—*The Citizens' Bank* v. *The Nantucket Steamboat Company*, 2 Story's R. 16, and cases there cited; and see 2 Greenl. Ev. p. 205.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Baker, for the plaintiffs.

J. G. Jones and *J. E. Blythe*, for the defendants.

Doe on the Demise of Pidgeon v. Richards.

When a lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also, and *vice versa*.
The lessor may determine the lease by notice to quit.

Wednesday, November 30.

ERROR to the *Bartholomew* Circuit Court.

Perkins, J.—Ejectment by *Doe* on the demise of *William F. Pidgeon* against *Thomas J. Richards* for a tract of land in *Bartholomew* county. Judgment below for the defendant.

The facts of the case are, that *William Richards*, then the owner in fee of the land in question, died in 1846, having devised said land to his wife, *Elizabeth Richards*,

for her life. Subsequently, said *Elizabeth* leased the land to her son, *Thomas J. Richards*, the defendant, who was then living upon it with his mother, executing to him an instrument as follows:

"Article of agreement between *Thomas J. Richards* of the first part, and *Elizabeth Richards* of the second part, witnesseth, that the said *Thomas J. Richards* is to occupy the premises that he now occupies, with full privileges to improve at his pleasure, and enjoy all the privileges of ownership, and to occupy so long as he desires; and in consideration therefor, the said party of the first part hereby obligates himself to grant unto the said *Elizabeth Richards* the privilege of living within his house and enjoying all that is necessary to health and comfort at his expense. And in case of the death or removal of the party of the first part, the place to revert to the party of the second part. It is further agreed that the said *Thomas J. Richards* has privilege to sell or dispose of the stock and other appurtenances belonging to the farm, the same as though he was prime owner." Signed by the parties and sealed, *October* 25, 1848.

After the execution of this instrument, said *Thomas* and *Elizabeth* continued to reside together on the land, he exercising full control, till the spring of 1851, when said *Elizabeth* left, having deeded the premises to the lessor of the plaintiff, *Pidgeon*, and given said *Thomas* notice to quit.

This suit was commenced *March* 19, 1851. The only brief furnished is a very brief one from the plaintiff, informing us that the case turned below upon the effect of the lease or instrument in writing above set out, and that it was there held that it conveyed a life estate to said *Thomas J. Richards*. The substance of that instrument is, that it gives to *Richards* the right to occupy and improve the land in question for a certain consideration, payable as he occupies, as long as he shall please to do so. It gives him no absolute interest, which he can convey to another on vacating the premises himself. Whenever he removes from them, his right in them ceases.

Nov. Term, 1853.

Doe v. Richards.

And he is not bound to occupy them and pay the consideration a day longer than he sees fit to do so. He has, in short, under the instrument, an estate in the land at his own will. Such being the character of the instrument, the case is easily disposed of.

Lord *Coke*, in his first Inst., 55 *a*, says: "It is regularly true, that every lease at will must in law be at the will of both parties, and, therefore, when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes that seeme *prima facie* to differ, cleerly reconciled."

This law of Lord *Coke's* day continues to be the law of the present day.

There was a case in *Massachusetts* in 1834, in which the congregational society in *Sagus*, on the petition of certain persons, "voted that *Ezra Brown* and others, have liberty to erect a seminary house on the parsonage land within what is hereafter described the seminary yard, with liberty to remove the same at pleasure, and that they have the land from the road over the knoll back to the wall, and from the west end of the house to the barn, inclusive, for a seminary yard, with the exception of a carriage passage-way from the house to the road and to the barn, to be common to the occupier of the house and the seminary building, and that each have a passage-way and the use of the pump."

The building was erected on the parsonage ground by those to whom the privilege was granted, having a cellar, stone foundation, with a "brick furnace in the cellar to warm the whole building through tubes."

The Supreme Court held that the society had power to make the lease—that it was made upon a good and valuable consideration—but that it was but a lease at the will of the lessors as well as of the lessees, and that *Brown* and his associates might be ejected at any time

upon notice to quit. *Cheever et al.* v. *Pearson et al.*, 16 Pick. 266.

So, in the case before us, the lease being at will, was determined by notice to quit; and that having been given, the plaintiff should have recovered.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. A. Hammond and *H. O'Neal*, for the plaintiff.

W. Herod, *S. Stansifer*, *W. Singleton* and *R. Hill*, for the defendant.

CLIFFORD and Others *v.* Smith.

Debt on a penal bond. The conditions were that the obligee had leased to the obligors a steamboat for a specified term, with her tackle, &c., for a sum named—the obligors to have the control of the boat during the term, and to return her, with her fixtures, at *E.*, in as good condition, &c., reasonable wear excepted. The lessees were to pay the expenses of the boat during the term. If the boat should be stopped for debts previously contracted, the lessees were to be discharged as to rent, &c., but if destroyed while in the lessees' possession, then, besides paying the rent, they should also pay a sum specified for the boat. On the performance of these conditions, the bond was to be void. The obligee warranted the boat to be sound, seaworthy, and to contain the necessary apparel, &c. *Held*, that the covenants in the condition of the bond were not dependent.

The first breach assigned was, that the obligors did not return the boat in as good condition, &c., whereby the obligee was obliged to expend 2,000 dollars in repairing her, &c. A plea to this breach set up, that though the boat was not in some respects in as good condition when returned as she was, &c., yet in others she was in a better condition, &c. *Held*, that the plea was bad either on special or general demurrer.

Another plea to the same breach averred that the obligor was not compelled to expend 2,000 dollars, &c. *Held*, that the plea was no answer to the substantial part of the breach.

Nov. Term, 1853.

CLIFFORD v. SMITH.

Held, also, that the defendants could not set up by plea that the boat when received by them was not in good repair, &c.

Held, also, that they would not be excusable for taking the boat into dangerous waters, for the navigation of which she was not properly equipped.

Held, also, that after having used the boat a month and snagged her, it was too late to set up that she was not properly fitted, &c., for navigation, and was of no value.

In a suit upon a bond, a contemporaneous verbal agreement or understanding different from its stipulations, cannot be set up in bar.

Where payment is pleaded, the burden of proving the plea is upon the defendant.

Wednesday, November 30.

ERROR to the *Vanderburgh* Circuit Court.

STUART, J.—Debt on a penal bond by *Smith* against *Clifford* and others. The issues of fact were submitted to a jury. Verdict for 2,000 dollars. Motion for a new trial overruled, and judgment on the verdict. The evidence is all in the record.

The bond, in the penalty of 5,000 dollars, has the following condition, the recital of which will tend to throw light on the subsequent pleadings, viz., that whereas *Smith* had that day leased the steamboat *DeKalb* for three months from *January* 19, 1848, together with all her tackle, &c., for 1,000 dollars, payable in three equal monthly instalments, for which *Clifford & Co.* had given their three notes—*Clifford & Co.* to have the whole control of the boat during the lease, and to return her with all her fixtures at *Evansville*, in as good condition, &c., reasonable wear excepted. The lessees to pay all the expenses of the boat during the period of the lease. Should the boat be stopped for debts previously contracted, *Clifford & Co.* to be discharged as to the rent, &c.; but if she were destroyed while in the possession of *Clifford & Co.*, then, in addition to the rent, that they should pay 4,000 dollars more for the boat. On the performance of these conditions, the bond was to be void. *Smith*, on his part, warranted the boat perfectly sound and seaworthy, and in good running order, and that she contained all the necessary tackle, apparel, &c.

The breaches assigned were—

1. That *Clifford & Co.* did not return the boat in as good condition, &c.

2. That the boat was destroyed, but the lessees did not pay the 4,000 dollars.

3. That the lessees had failed to pay two months' rent, amounting to 666 dollars.

4. That the lessees had not paid the current expenses, &c., but suffered her to be attached and sold.

5. That they failed, &c., to return the boat.

Of the twelve pleas filed, four were addressed to the first breach, three to the third breach, one to the second breach, and two pleas to each of the fourth and fifth breaches.

Issues of fact were formed on the plea to the second breach; on the second plea to the third breach; and on the first plea to the fifth breach. To the other pleas demurrers were sustained.

The ruling of the Court on the demurrers is the first error complained of. The first plea to the first breach sets up, that though the boat was not in some respects in as good condition when returned as she was, &c., yet in other respects she was in a better condition, &c. This plea does not seem to tender any traversable issue. And if it did, the doctrine of compensations which it necessarily assumes is not tenable. At least no authority has been cited in its support. The causes assigned in the special demurrer are well taken; and it is bad also on general demurrer.

The second and third pleas to the first breach, the third plea to the third breach, and the first plea to the fourth breach, set up in bar a contemporaneous verbal agreement or understanding different from the stipulations in the bond. The demurrers to these pleas were properly sustained. *Jacobs* v. *Finkel*, 7 Blackf. 432, and the numerous authorities there cited from our own reports.

The fourth plea to the first breach avers, that *Smith* was not compelled to expend 2,000 dollars, &c., and is no answer to the substantial part of the breach.

The first plea to the third breach, the second plea to

Nov. Term, 1853.

CLIFFORD v. SMITH.

the fourth breach, and the second plea to the fifth breach, each set up a variety of matters bearing no supporting connection, and no one of which constitutes separately a bar to the breach to which it is addressed. Among other things it is erroneously assumed, that the covenants in the condition of the bond are dependent. *Bryan v. Fisher*, 3 Blackf. 316. Regarded as pleas setting up failure of consideration, they are equally defective. *Wynn* v. *Hiday*, 2 Blackf. 123. *Clifford & Co.* were not compelled to accept the boat if she was not in proper repair. Nor would they be excusable for taking her into dangerous waters, for the navigation of which she was not properly equipped. After they had used her a month and snagged her, it was too late to set up that she was not properly fitted and furnished for navigation, and of no value. *Howard* v. *Cadwalader*, 5 Blackf. 225.—*Garrett* v. *Heaston*, *id.* 349.—*Mullikin* v. *Latchem*, 7 *id.* 136.

Some objection was taken to the course of evidence on the trial, because *Smith* did not produce the notes given for the rent of the boat, to support the third breach, or rather, it would seem, to disprove the plea of payment filed. But aside from the consideration that *Smith* had not sued on the notes, the proof of the plea of payment devolved on *Clifford*. Had a presumption of payment been raised, *Smith* might have used the notes to rebut. There is nothing, however, in the objection; for the record in this case would be an effectual bar to a recovery on the notes.

It remains but to consider the alleged error of the Court in overruling the motion for a new trial. After a careful examination of the evidence, which is all in the record, we think the verdict a very fair deduction from it, and the motion for a new trial correctly overruled.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. G. Jones, for the plaintiffs.

C. Baker and *J. E. Blythe*, for the defendant.

WENDOVER and Others *v.* TUCKER.

Imprisonment for debt is abolished in this state, except in cases of fraud.

Under the R. S. 1843, a *ca. sa.* only issued where it appeared affirmatively by the finding of the Court or jury that the debtor had money or property which he fraudulently concealed or refused to give up.

The policy of the law allowing the imprisonment of debtors being, in this state, to prevent fraud, it should receive a strict construction as to the debtor and a liberal one as to the creditor.

The R. S. 1843 provide for that rule of construction.

There are but two cases, under the R. S. 1843, in which a magistrate can discharge an insolvent: 1. Where a person taken on a *ca. sa.* is *in the hands* of the officer making the arrest; 2. Where the person is actually imprisoned in jail on such arrest.

After a debtor has given a bond for the prison limits, he is no longer in the hands of the officer, and the latter has no control over him.

A discharge by a magistrate of a person who has given bond for the prison limits, is, under the R. S. 1843, unauthorized and void.

The actual imprisonment in jail spoken of in the R. S. 1843, means confinement in the jail of the county, properly so called, as distinguished from the "prison limits."

ERROR to the *Laporte* Circuit Court.

Wednesday, November 30.

STUART, J.—Debt by *Tucker* against *Wendover* and others on a bond for the prison limits. The declaration alleges the recovery of judgment, the issue of a *capias* on proper affidavit, the arrest of *Wendover*, the giving of the prison bond conditioned in the usual form, and the escape beyond the limits of the county without being duly discharged by law.

The proceeding to obtain the prison bounds was had under chapter 57, R. S. 1843, p. 1019.

The defendants filed five pleas leading to issues of law and fact. Trial and judgment for *Tucker*.

To reverse this judgment the sureties of *Wendover* prosecute the writ of error.

The substance of the defence is embraced in the second plea. That plea assumes that *Wendover* was legally discharged from imprisonment, under chapter 40, R. S. 1843, s. 448, *et infra*. It is further averred, that *Tucker* was present before the magistrate and propounded to *Wend-*

Nov. Term, 1853.

WENDOVER v. TUCKER.

over such questions as he thought proper; that the examination was reduced to writing, filed in the clerk's office, and *Wendover* discharged by the justice, &c.; that the property given up by him to the sheriff was sold, and the proceeds applied on the judgment. The first, fourth and fifth pleas were in substance the same; and on demurrer were held insufficient.

The record presents but one question: Does *Wendover* show a sufficient compliance with the statute in procuring his discharge? In other words, was he legally discharged?

The rule of construction applicable to this statute, is first to be settled. As a law in favor of personal liberty, it would seem that it ought to receive a liberal construction. But such is not the rule heretofore adopted by this Court. In giving construction to a similar statute (that of 1838) the Court held the party to considerable strictness. *Webster* v. *Farley*, 6 Blackf. 163.

There are controlling reasons why such strictness should now be observed more rigidly. Imprisonment for debt was then a common mode of procedure to enforce payment. It is now abolished, except in cases of fraud. Gen. Laws 1842, p. 68.—R. S. 1843, p. 752.—R. S. 1852, vol. 1, p. 346; vol. 2, p. 152. Under the statute of 1843, which governs this case, the writ of *ca. sa.* did not issue indiscriminately against every debtor on the return of *nulla bona*, but only against such as were removing or concealing their property. To obtain the writ the execution-plaintiff had to aver these facts, and upon issue being taken thereon, to prove them. R. S. 1843, p. 753. So that, under that statute, the *ca. sa.* never issued only when it appeared affirmatively by the finding of the Court or jury, that the debtor had money or property which he fraudulently concealed or refused to give up. In other words, the debtor must first be convicted of fraud before the *ca. sa.* issues, and then only for the temporary and special purpose of coercing a delivery of the property fraudulently concealed. When he had thus rendered even reluctant homage to honesty, his personal liberty was at once restored.

The policy of the law being to prevent frauds, it should receive a strict construction as to the debtor—liberal as to the creditor. If there could be any doubt, the language of the statute itself seems conclusive as to the rule of construction. It provides that the prisoner who brings himself strictly within the law, may avail himself of its benefits. R. S. 1843, p. 756.

It but remains to inquire whether *Wendover* has brought himself strictly within the law. The objection is, that the act under which he was discharged was not applicable to his case—that the justice of the peace had no authority. The mode of discharge before a magistrate is applicable to only two specified cases. 1. Any person taken on a *ca. sa.*, while in the hands of the officer making the arrest, and, 2. Any person being actually imprisoned in jail on such arrest, may discharge himself, &c.

It is not pretended that *Wendover* comes under the first specification—that he applied for his discharge while in the hands of the officer making the arrest. After the giving of the bond for the limits, the sheriff had no further control over him. Any act of restraint on *Wendover* while on the limits, would have been as much a false imprisonment on the part of the sheriff as though it had been done by any other citizen of *Laporte* county. The moment the bond was given, the authority of the sheriff over him ceased. *Wendover* was free to go where he pleased in the county or out of it—the only consequence of his leaving the county being the forfeiture of his bond. At the time *Wendover* applied to the magistrate to be discharged, he was not in the hands of the officer making the arrest; and, therefore, was not, on that ground, entitled to such discharge.

Has *Wendover* brought himself within the second specification? Was he actually imprisoned in jail on such arrest? With reference to the jailer as to the sheriff, he had a right to go where he pleased. In fact, the jailer was the sheriff. R. S. 1843, p. 1017. In case of his escape from the limits, no liability was thereby devolved on the officer either as jailer or sheriff. Nor

Nov. Term, 1853.

WENDOVER v. TUCKER.

can *Wendover* be said to be imprisoned in the county, for there was no county officer authorized to control his movements. And the statute clearly distinguishes between the jail of the county and the prison limits of the county. *Wendover* was not, therefore, actually imprisoned in the jail of the county within the meaning of the act, and not being so imprisoned, was not entitled to relief in the manner contended for under the second specification. His discharge by the magistrate was, therefore, unauthorized and void.

His remedy, if any, was under the 29th chapter R. S. 1843, which seems to embrace all the cases not provided for in the 40th chapter.

We have been referred with some confidence on the part of the plaintiffs in error, to 9 Met. 303, and 11 *id.* 73. The first, *Jenkins* v. *Newell*, was a decision on the *Massachusetts* statute of 1842, in relation to poor debtors. That act provided that a person arrested for any debt, might give notice to the officer having him in custody, or if he be then bailed out, to the officer who made the arrest, that he was desirous of taking the oath prescribed for poor debtors, &c. The notice was served on the jailer; and it was held that the debtor having given bond for the jail limits, the notice was properly given. The Court reasoned, that though the jailer had no control over him, yet as a surrender, if made by his bail, must be to the jailer, he might still be regarded as constructively in the jailer's custody; and that the notice contemplated by the statute was, therefore, properly served. This case was subsequently reviewed and approved by the same Court in the *Providence Bank* v. *Fullerton*, 11 Met., *supra*.

But these cases simply decide that for the purpose of notice, the debtor on the prison limits may be considered as constructively in the custody of the jailer. They do not apply to the case at bar. The question is not whether *Wendover* was constructively imprisoned, but whether, in the language of the statute, he was "actually imprisoned in the jail." It is too specific to admit of any latitude of construction. The actual imprisonment spoken

of must mean confinement in the jail of the county, properly so called, as distinguished from the "prison limits." There is, therefore, no conflict with the *Massachusetts* decisions. We might safely say that the debtor was constructively in the custody of the jailer, for certain purposes necessary to carry out the ends of justice, and yet consistently adhere to the decision we have indicated. If there is any difference in the rules of construction adopted by the two courts, we adhere to that sanctioned by our own Court in *Webster* v. *Farley, supra.*

The demurrers to the first, second, fourth and fifth pleas were properly sustained.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. B. Niles, for the plaintiffs.

J. L. Jernegan, for the defendant.

CRUTZ *v.* THE STATE.

A formal statement that an indictment was found by the authority of the state, is not necessary, if it appear from the record that the prosecution was in the name of the state.

At the *June* term, 1851, of the board of commissioners of *Switzerland* county, on the petition of twenty-four freeholders of *York* township in that county, it was ordered that one *C.* should have license to retail spirituous liquor in *Florence*, in said township, for one year, upon his paying 15 dollars into the county treasury, and giving bond, &c. *C.* accordingly paid the treasurer that sum and presented to the board the treasurer's receipt therefor, and also a bond in the penalty prescribed, with sufficient surety, conditioned according to the statute; and thereupon moved for the approval of the bond; but the board overruled the motion, on the ground that they had reconsidered and set aside the order granting license, and had ordered that said sum paid by *C.* to the treasurer should be refunded. *Held*, that the order of the board was inoperative, without an approval of the bond, and gave *C.* no authority to retail. *Held*, also, that the board had power to set aside the order granting the license, at any time before the approval of the bond.

Nov. Term, 1853.

CRUTZ v. THE STATE.

Wednesday, November 30.

ERROR to the *Switzerland* Circuit Court.

DAVISON, J.—Indictment for retailing spirituous liquor without license. Plea, not guilty. Verdict for the state. Motions to set aside the verdict and for a new trial overruled, and judgment on the verdict.

Upon the trial, the defendant below produced the record of the board of commissioners of *Switzerland* county, showing that at the *June* term of said board, in the year 1851, on the petition of twenty-four freeholders of *York* township, in said county, it was ordered that the defendant should have license to retail, &c., in *Florence*, in said township, for one year, &c., upon his paying 15 dollars into the county treasury, and giving bond, &c. The defendant also gave in evidence a receipt from the treasurer of said county for the payment of said 15 dollars, and a bond in the penalty of 500 dollars, with sufficient security, conditioned as the statute in such case provides. The record of said board further shows, that on the same day the order for license was made, the defendant produced to the board said receipt and bond, and thereupon moved for the approval of the bond. The commissioners overruled the motion on the ground that they had reconsidered and set aside the order granting the license, and had ordered that the money paid by the defendant to the treasurer should be refunded. It appears that the order was set aside on the motion of one *John Dumont;* that the defendant was present when the motion to set aside, &c., was made, and tendered the receipt and bond to the board after he was notified of the motion. *Dumont* was not a resident of said township, nor did any one employ or request him to make said motion. It was shown that the voters of *York* township had by vote, at the spring election, 1851, decided in favor of granting license to retail, &c.; and it was proved that the defendant sold spirituous liquor as charged in the indictment.

Upon the close of the evidence, the defendant moved the Court to instruct the jury as follows:

1. That to justify the defendant it is not absolutely necessary that there should be a written or printed paper

signed by any one; but the grant of a proper authority to a person to do a lawful act, is a license in contemplation of law.

2. If the defendant has presented to the board of commissioners a proper petition, and has obtained a grant to retail, &c., and has paid the amount charged to the county treasurer, that grant amounts to a license.

3. If the jury believe that the township of *York*, where the defendant resides, voted for license, and *John Dumont* was not a citizen of said township, he had no interest in the defendant's application, and had no legal right to make objection to the granting of license to the defendant, nor was the defendant bound to notice such objection.

4. That when the board had granted the defendant the privilege of retailing, &c., and he had accepted the grant, paid for it and tendered a good deed, it was a contract which neither party was at liberty to revoke.

These instructions the Court refused, and charged the jury as follows:

1. If the defendant sold spirituous liquor by a less quantity than a quart at a time, as charged, they should find him guilty, unless he has proved that he had a license to do so.

2. The commissioners had a legal right to set aside the first order made by them, at any time during the term when it was made; and having so set it aside, it stood as though it had not been approved, and no license had been granted for any cause. His previous application to the board is no justification or defence. The jury should presume that the defendant knew the law.

It is contended that the judgment should have been arrested for this reason, viz., the indictment does not charge that it was found "in the name and by the authority of the state."

This is a mistake. "A formal statement that an indictment was found by the authority of the state, is not necessary, if it appear from the record that the prosecution was in the name of the state." Wharton's Crim.

Nov. Term, 1853.

HUBBS v. BANCROFT.

Law, 101. The record before us shows that the state is a party, and that the prosecution was carried on in her name and by her authority. This, we think, sufficiently meets the requirements of the constitution, without any specific allegation in the indictment to that effect. R. S. 1852, vol. 1, p. 61.

But the question on which the decision of this case mainly turns is this: Was the defendant, at the time of the alleged offence, licensed to retail, &c.?

No written or printed license was ever issued in his favor; but he contends that under the facts presented by the record, the first order amounted to a license. This view is not correct. The commissioners refused to approve his bond. Without such approval the order was inoperative, and gave him no authority to retail. R. S. 1838, pp. 581, 582, ss. 2 and 5.—R. S. 1843, c. 50, s. 15. But the order granting the license was set aside. This the board had power to do at any time before the bond was approved. Therefore, the defence set up constituted no bar to the prosecution.

The Court, in our opinion, charged the jury correctly, and committed no error by refusing the instructions moved by the defendant.

Per Curiam.—The judgment is affirmed with costs.

J. G. Marshall and *D. Kelso*, for the plaintiff.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

---

4 388
136 688

HUBBS and Others *v.* BANCROFT and Others.

Whether a deed made upon a valuable consideration is fraudulent or not, is, under the R. S. 1843, a question of fact and not of law.

A debtor in embarrassed circumstances and capable of contracting, may sell his property, for the purpose of discharging his debts, for such consideration as he may choose, and if there be nothing illegal in the transaction, it will stand as against his creditors.

A creditor can obtain a lien by filing his bill in equity only where no lien has been gained or can be acquired at law.

Nov. Term, 1853.

HUBBS v. BANCROFT.

ERROR to the *Jefferson* Circuit Court.

Wednesday, November 30.

DAVISON, J.—Bill in chancery by the defendants in error against the plaintiffs in error. The object of the suit was to subject a part of lot No. 61, in the city of *Madison*, to the payment of a judgment at law against *Benjamin* and *Joseph Hubbs*. *Benjamin Hubbs*, *Charles W. Basnet* and *Charles Fox* answered. The other defendants, viz., *David H. White*, *Edward Warner* and *Joseph Warner*, (who were partners under the name of *David H. White & Co.*) *Samuel Bespham* and *James F. D. Lanier*, were defaulted.

The facts are, substantially, as follows:

On the 6th of *March*, 1836, *Basnet*, by deed in fee, conveyed the lot in question to *Benjamin Hubbs*, who was his son-in-law, the husband of his only child. The property conveyed by this deed was a mere gift. In 1841, previous thereto, and up until 1844, *Benjamin* and *Joseph Hubbs* were partners in the dry-goods business in *Madison*. *Joseph* was a man of limited means, and gave to the concern no credit. *Benjamin* had an extensive credit in the eastern cities; and the firm had contracted a large amount of indebtedness. In *April* and *September*, 1841, they executed three notes to the complainants, who, at the *September* term, 1846, recovered a judgment in the *Jefferson* Circuit Court on a balance then due on said notes, for 2,765 dollars, upon which an execution was issued and returned "*nulla bona*." The present suit is founded upon said judgment.

On the 1st of *September*, 1843, *Benjamin Hubbs* called on *Basnet* and proposed to re-convey said lot to him for the consideration of 1,060 dollars. *Basnet* was at first unwilling to accede to the proposition, but having become satisfied that to do so would advance the interest of *Hubbs*, he gave him 1,060 dollars, and took a conveyance. At this period the lot was worth 4,500 dollars. When the re-conveyance was made, *Hubbs* was largely indebted—had become embarrassed and unable to meet his debts

Nov. Term, 1853.

Hubbs v. Bancroft.

promptly. *Basnet* knew of this embarrassment, but not the extent of it. He believed that the pressure on *Hubbs* was temporary, but that he was able to meet all the demands against him. *Hubbs* had suspended payment, but it appears that he thought his means sufficiently ample to enable him speedily to render full satisfaction to all his creditors. Within a short period after the lot was reconveyed, *Basnet* purchased of *B.* and *J. Hubbs* their entire stock of goods then on hand, at full value. In payment therefor, he gave them his promissory notes. These notes were used by *Hubbs* in paying their debts. The object of *Basnet* in making this purchase, as also that of the lot, appears to have been to enable *Hubbs* to pay all his debts at an early day. It was shown that one *William Delta*, on the 21st of *November*, 1843, recovered a judgment in the Circuit Court of the *United States* for the district of *Indiana*, against *B.* and *J. Hubbs*, for 1,303 dollars. This judgment was, on the 29th of *January*, 1844, duly assigned to said *Basnet*. On the 21st of *May*, 1844, *Atwood & Co.*, upon notes given in *April*, 1841, and in *October*, 1842, recovered a judgment, in the same Court, against said *B.* and *J. Hubbs*, for 1,566 dollars. This judgment was assigned to *James F. D. Lanier*, and upon it an execution was issued, and on the 29th of *January*, 1847, the lot in question was sold to said *Lanier* for 2,225 dollars, by the marshal for said district, who made him a deed. The amount for which the lot sold was one-half its appraised value. Afterwards, on the 22d of *February*, 1847, *Lanier*, for the consideration of 2,225 dollars, conveyed the lot to *Basnet*. It further appears that *Charles Fox*, on the 18th of *November*, 1844, upon a note dated *September* 8, 1841, recovered a judgment in said Court against *B.* and *J. Hubbs* for 1,835 dollars; that *Samuel Bespham*, on the 24th of *September*, 1844, upon a note given in *September*, 1841, obtained a judgment against them, in the *Jefferson* Circuit Court, for 948 dollars; and *David H. White & Co.*, on the 21st of *August*, 1847, upon a note dated *September* 7, 1841, recovered a judgment in said Court against *Benjamin Hubbs* for 648 dollars. All

of the above judgments, at the time this bill was filed, were outstanding and unsatisfied.

The bill prays that the premises be sold; that after the payment of said 1,060 dollars, with interest from the 1st of *September*, 1843, out of the proceeds, to the said *Basnet*, the complainants may be paid their judgment and interest; and for general relief.

The cause was submitted on bill, &c. The Court, upon final hearing, decreed that if *Basnet* would, within ninety days, &c., pay to the complainants their judgment, with interest, &c., then his title to the premises was to be forever good, &c., against the creditors of *Hubbs;* but in default of such payment the lot was to be sold, &c.; that out of the proceeds *Basnet* should be first paid 1,060 dollars, with interest, &c. The balance, or so much thereof as might be necessary, was to be applied to said judgment and interest thereon, &c., and the balance, if any, to be paid into Court, to await the further order, &c.

The case presented by the record leads us at once to inquire whether the deed from *Hubbs* to *Basnet* was made with intent to hinder, delay or defraud creditors. If fraudulent at all, it was actually so.

At common law, fraud was always a question of fact; but under the statute of 13 *Elizabeth*, the courts held that a voluntary conveyance was, as to existing creditors, constructively fraudulent. However, these decisions did not extend to a deed made upon a consideration deemed valuable. This conveyance was upon such consideration, and whether, in the case before us, the proofs show a fraudulent intent, is a question of fact and not of law. We have a statutory provision which settles this rule, and seems, in all cases arising under the act, to reduce fraud to a matter of intention. R. S. 1843, c. 33, s. 22.

When the lot in question was sold, *Hubbs* was largely indebted; the consideration given for it was obviously inadequate. These were facts from which actual fraud was inferable. But they were mere badges of fraud, and not fraud *per se*. Therefore it was competent for the parties to that sale to explain any suspicious circumstances sur-

Nov. Term, 1853.

Hubbs v. Bancroft.

rounding the transaction. It seems to us the record affords proof sufficient to repel any inference of a fraudulent intent, and leave the conveyance without imputation. It shows that *Hubbs*, when he sold the lot, believed that he had ample means to pay all his debts. *Basnet*, it appears, was of the same belief. We think it is clearly shown that the sale of the lot and store goods was made by *Hubbs* with the design of meeting his liabilities. To effect such purpose, the sale of property at less than its real value, and even at a sacrifice, is not unusual, and of itself would not indicate an impure intention. An individual may, under pressure of circumstances, be induced to sell at a particular time. The consideration, whether more or less, supports the contract. If he is competent to make a contract, he may dispose of his property as he pleases, provided there be nothing in the transaction illegal.

It is conceded by the complainants that the parties to the conveyance did not intend to commit actual fraud; but they contend that the sale was so inequitable that *Basnet*, after being repaid the amount by him advanced, with interest, should be held a trustee for *Hubbs's* creditors. This position does not seem to be correct, when all the facts connected with the transaction are considered. It appears to us that the sale was not inequitable. The lot was, in the first instance, a pure gift from *Basnet* to *Hubbs*. It never constituted any portion of his trading capital. Nor is there anything in the evidence upon which to found the slightest belief that credit was ever extended to him on account of it.

But suppose the sale was inequitable; the circumstances that made it so must have been the indebtment of *Hubbs* and the inadequacy of consideration. These facts were evidence of actual fraud, and, unrebutted, the conveyance must be deemed void as to creditors. As to them, the title would still be in *Hubbs;* the judgments against him liens on the property; and the lot subject to execution at law. R. S. 1843, c. 29, ss. 1, 2, 3. This view does not help the complainants. Their judgment

was a lien on the premises, subject, however, to the prior liens set forth in the record. They did not even procure the levy of an execution. Then, could they by their bill acquire a specific lien, and thereby obtain a priority and preference over the other creditors? We think they could not. "It is only where no lien is gained or can be acquired at law, that a creditor can obtain it by filing his bill." The judgment set forth in the bill being the junior, the complainants were not entitled to a preference. From this it would seem to follow that the decree cannot be sustained.

But the ground upon which we decide is, that the evidence, in our opinion, does not show the conveyance to have been made or received with intent to hinder, delay or defraud creditors. Therefore, the decree must be reversed, and the Circuit Court ordered to dismiss the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

S. C. Stevens and *J. Sullivan*, for the plaintiffs.

J. W. Chapman, for the defendants.

The State *v.* Williams.

The infringement by the sheriff of a positive law, while acting in his official capacity, is such a violation of his duty as amounts to a breach of his bond.

Indictment against a sheriff, predicated upon s. 5, c. 104, acts 1841, which was revived and continued in force by an act of 1844. The indictment, after setting out a decree, &c., in favor of, &c., and against the unknown heirs of one *A.*, the issuing of an execution and the levy thereof on a certain tract of land, charged that the sheriff, while acting as such, during the sale of said land, unlawfully and knowingly did, &c., procure one *B.* to bid off and buy said land at said sale for the use and benefit of him, the sheriff, and that *B.* did then, &c., bid off and buy the land for the sheriff, with the intention then and there to cheat and defraud said unknown heirs, &c , in the sum of, &c. The sale was alleged to have been made on the 18th of *May*, 1850, and the indictment was found at

Nov. Term, 1853.

THE STATE v. WILLIAMS.

the *April* term, 1852. *Held*, that the section of the act upon which the indictment was founded, created two distinct offences; one for being knowingly guilty of an act or omission amounting to a breach of his official bond, which is punished by fine; the other for being guilty as aforesaid, with intent to defraud or injure any person, &c., which is punished by fine and imprisonment; and that the first offence was well described, but the latter was not. But, *held*, that the prosecution for the first offence was barred by the statute of limitations.

Thursday, December 1.

ERROR to the *Warrick* Circuit Court.

ROACHE, J.—This was an indictment against *Williams*, charging him with malfeasance in office, as the sheriff of *Warrick* county. The indictment, after setting out a decree of the *Warrick* Circuit Court in favor of *James C. Graham*, against the unknown heirs of *Patrick Donagho*, the issuing of an execution, and the levy thereof on a certain tract of land, proceeds as follows:

"And the jurors aforesaid," &c., "do further present that the said *Williams*, so being sheriff of the said county, and while acting as such, at and during the said sale of the said land, unlawfully and knowingly did then and there procure the said *Nicholas Taylor* to bid off and buy the said tract of land at said sale for the use and benefit of the said *Williams*, so being sheriff as aforesaid, and that the said *Taylor* did then and there bid off and buy the said tract of land for the said *Williams*, he being then and there sheriff as aforesaid, with the intention then and there to cheat and defraud the said unknown heirs of *Patrick Donagho*, in the sum of one hundred dollars," &c.

The Court quashed the indictment, and the state brings it to this Court.

The indictment was predicated on s. 5, c. 104, acts of 1841, p. 185, which is in these words:

"That whenever any officer known to the constitution or laws of this state, from whom an oath and bond of office are required, may be knowingly guilty of any act or omission which shall amount to a breach of his official bond, he shall be deemed guilty of malfeasance in office, and upon conviction thereof, he shall be fined in any sum not less than ten, nor more than fifty dollars; and whenever any such officer may be guilty as aforesaid, with in-

tent to defraud or injure any person or persons, body corporate or politic, he shall be deemed guilty as aforesaid, and, upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and imprisoned in the jail of the proper county for any determinate period; or fined as last aforesaid, and imprisoned at hard labor in the state prison, for any term of time not less than one, nor more than fourteen years, according to the circumstances of the case and the sound discretion of the court or jury trying the same."

This act was not incorporated in the revision of 1843, but was revived and continued in force by an act approved *January* 13, 1844. See acts of that year, p. 99.

There can be no question but that the offence described in the indictment did amount to a breach of the sheriff's official bond. Section 428, c. 40, R. S. 1843, expressly prohibits any officer making a sale on execution, from becoming a purchaser, either directly or indirectly, at such sale. The infringement of a positive law is such a violation of his duty as amounts to a breach of his bond. See *The State ex rel. Chapman* v. *Lines*, decided at the present term. (1)

There is, however, a fatal defect in the indictment.

It will be observed that the statute creates two distinct offences, different as to the extent and kind of punishment. The first, which consists in "knowingly being guilty of any act or omission, which amounts to a breach of his official bond," is punished by fine only, not exceeding 50 dollars. The indictment was found at the *April* term, 1852, and the sale is alleged to have taken place on the 18th day of *May*, 1850. The prosecution for this offence was consequently barred by the statute. R. S. 1843, c. 54, s. 4.

The other offence created by the act, embraces an additional element. It enacts that whenever the officer shall be guilty as aforesaid, with intent to defraud or injure any person, &c., he shall be subject to indictment, &c., and the punishment is fine and imprisonment, or confinement in the state prison for not less than one, nor

Nov. Term, 1853.

STEWART v. THE STATE.

more than fourteen years, at the discretion of the jury. The latter offence is not barred by the statute.

The misdemeanor is well described. It sufficiently charges that the sheriff indirectly purchased at the sale, by procuring *Taylor* to buy, and were this offence not barred by the statute, the indictment should be sustained.

But in the description of the larger offence, the material allegation is wanting. The intent to defraud is the gist of the offence. In the indictment, the intent to defraud is alleged to have existed on the part of *Taylor*, but not on the part of the sheriff. This was not sufficient. Being of the substance of the crime, it ought to have been charged to exist in the sheriff, and not alone in the person through whom he is alleged to have made the purchase.

Per Curiam.—The judgment is affirmed.

A. L. Robinson, for the state.

C. Baker, for the defendant.

(1) *Ante*, p. 351.

STEWART and Another *v.* THE STATE, for the use of School District No. 2, &c., in *Dearborn* county.

It is unnecessary to examine the validity of a special plea where all the evidence admissible under it has been admitted under the general issue.

A. was elected, at the regular election in 1849, a district trustee, under s. 39 of the act of 1849, to increase and extend the benefits of common schools. No election was held in 1850. *Held*, that *A.* was thereby continued in office, and that an appointment by the township clerk of another person in his stead, under the act of 1850, amendatory of said section, was void.

Nov. Term, 1853.

STEWART v. THE STATE.

Thursday, December 1.

APPEAL from the *Dearborn* Circuit Court.

ROACHE, J.—Debt on the official bond of *Stewart*, as treasurer, for school purposes, of a township.

The declaration alleges that a school had been kept in the district for more than three months, with an average of seventy scholars. That one *Walizer*, the trustee of the district, furnished the teacher a certificate of the fact, in accordance with the requisitions of the 10th section of "An act to increase and extend the benefits of common schools," approved *January* 17th, 1849; see acts 1849, p. 126; and that for his services, the teacher was entitled to the sum of 56 dollars and 75 cents. The teacher presented the certificate at a proper time and place to *Stewart*, and demanded payment, but was refused.

Trial by jury. Verdict and judgment for the plaintiff below.

Several pleas were filed, on which issue was taken.

To the fifth plea a demurrer was sustained. That plea denies, under oath, that the certificate and order set out in the declaration, were made by the trustee of said school district. It is unnecessary to examine its validity, as all the evidence which could have been given under it was admitted under the general issue.

The question which was litigated on the trial was, whether, according to the evidence, *Walizer* was, at the date of the certificate, *April* 23, 1851, the trustee of the district.

It appeared in evidence that *Walizer* had been elected at the regular election in *September*, 1849; that notice was duly given for the *September* election, 1850, but that no election was held; that on the 1st of *April*, 1851, the clerk of the township trustees appointed *John Huber* trustee of the district.

The question depends upon the construction of the statutes relating to the office of district trustee.

Section 9, of the act of 1849, p. 126, provides that—

"The business of each district shall be transacted by one district trustee, who shall be elected annually by the legally qualified voters of the district, on the first *Satur-*

Nov. Term, 1853.

STEWART v. THE STATE.

day of *September*, at which time also the general meetings of the voters of each district shall hereafter be held, and the said trustee shall continue in office until his successor is elected and qualified."

Walizer was elected and qualified in accordance with this act.

By an act approved *January* 2, 1850, the said 9th section was "so amended and extended, that where it has so happened or may happen, that no district trustee has been or shall have been elected, in the manner prescribed by said act, it shall be lawful for the township clerk to make an appointment of a district trustee, who shall serve as such till his successor shall be elected and qualified." Acts of 1850, p. 202.

By the act of 1849, under which *Walizer* was elected, he was entitled to hold the office for one year, and until his successor was elected and qualified. This latter expression has received a judicial construction by this Court. It has been decided that when the tenure of an office is prescribed to be for a given term, and until the successor shall be elected and qualified, the officer holds after the expiration of the term, and until he is regularly superseded by the election of another in his place. *Tuley* v. *The State*, 1 Ind. R. 500.—*The State* v. *Spears*, *id.* 515.

According to the act, then, of 1849, *Walizer* was the trustee of the district on the 23d of *April*, 1851, in consequence of the failure of the people to elect a successor in *September*, 1850.

It is contended, however, that the act of 1850 conferred upon the township clerk the power of appointing a successor. It will be found on examination, that that act has no application to a case where there has been a trustee elected by the qualified voters of the district. It, in terms, applies to those cases only where "no district trustee has been or shall have been elected in the manner prescribed by said act." In the present instance, *Walizer* was elected in the manner prescribed. He did not, consequently, fall within the provisions of the amending statute. There

was no such a vacancy as the township clerk was authorized to fill by an appointment. *Walizer* was, consequently, the trustee, until displaced by a successor elected by the qualified voters of the district.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. Ryman, for the appellants.

Egbert *v.* The State.

A judgment against an administrator, as such, to be paid out of the estate of the deceased, is not substantially, but merely nominally, a judgment against him: it is a judgment against the estate upon which he administers, and is never to be paid unless the estate is able to pay it.

Such a judgment was not, by the R. S. 1843, repleviable.

A person, by acknowledging himself a replevin bail upon such a judgment, did not, under the R. S. 1843, become liable for the debt.

Thursday, December 1.

APPEAL from the *Laporte* Circuit Court.

Perkins, J.—*Scire facias* by the *State* against *Jacob Egbert* and others, to revive a judgment in the *Laporte* Circuit Court. Judgment of revivor below.

The *scire facias* alleges that the state of *Indiana* had previously recovered a judgment for over 1,000 dollars against "*Paul Egbert*, *Elisha Egbert* and *William Egbert*, administrators of the estate of *John Egbert*, deceased, to be levied of the goods and chattels of the said *John Egbert*, deceased, in the hands of said administrators to be administered," &c., and that said *Jacob Egbert* had entered himself replevin bail for the payment of said judgment at the expiration of one hundred and eighty days from its rendition, &c.; that the judgment had not been paid, and that the administrators had wasted the assets, &c.

Paul, *Elisha* and *William Egbert*, defendants, made default. *Jacob* pleaded—

Nov. Term, 1853.

EGBERT v. THE STATE.

1. That *Elisha Egbert*, one of the defendants, had been discharged from his trust as administrator by the proper Probate Court.

2. That at the expiration of one hundred and eighty days, the plaintiff was not entitled to execution on said judgment.

3. That at the expiration of said one hundred and eighty days, no waste had been committed by the administrators.

4. That said administrators had faithfully applied all of the assets of said estate to the payment of debts owed by said estate, having by law priority of payment over the judgment in this suit mentioned.

General demurrers to these pleas sustained, and final judgment for the plaintiff below. Appeal by the defendant to this Court.

The demurrers go back to the *scire facias*, and it must, therefore, first be considered.

It is claimed that it is bad because it does not show a valid recognizance of replevin bail, but, on the contrary, shows one entered to stay a judgment not repleviable.

This objection imposes upon us the necessity of examining the statutes on the subject of replevin bail. Section 357, p. 738, R. S. 1843, enacts that "execution on such judgment thus stayed, and such recognizance of replevin bail, shall issue jointly against all the parties thereto." Under this provision, as is decided in *Carnahan* v. *Brown*, 6 Blackf. 93, the replevin bail becomes a joint judgment-debtor with the original defendant or defendants.

We must inquire, then, into the character of the judgment upon which *Jacob Egbert*, the defendant resisting below, and the plaintiff in this Court, became replevin bail.

It was a judgment in a suit instituted for the recovery of a demand against the estate of *John Egbert*, deceased, and required *Paul*, *Elisha* and *William Egbert*, the defendants, to pay it, according to the rules of law, out of the assets of said estate which might come to their hands as administrators; and that it should be so paid, was the ex-

tent of the liability to which the judgment, as such, subjected them. And as *Jacob* became, by his engagement, if the judgment was a repleviable one, a joint judgment-debtor with those men, the extent of his liability was simply that said judgment should be paid in that manner. In the event, then, that *Jacob Egbert* should be held legally liable to that extent, it will follow that his fourth plea was a bar to this proceeding against him, and that the Court below erred in sustaining a demurrer to it; for that plea alleged, in substance, that no assets for the payment of said judgment had come to the hands of said administrators, as all assets that had come to their hands had been exhausted in the payment of claims having a legal priority.

But we do not hold said *Egbert* legally liable as a judgment-debtor to any extent, not regarding the judgment in question a repleviable one. Under the statute above quoted, he could become, as we have seen, liable only as a joint judgment-debtor, the extent of which liability would be that the judgment should be paid out of assets, &c. But the statute nowhere provides for any such limited entry of replevin bail; but, on the contrary, expressly enacts that such entry shall be substantially in the following form: "I acknowledge myself replevin bail for the payment of the foregoing judgment," &c. And s. 346, p. 736, enacts, that "any party against whom a judgment shall have been obtained, may have a stay," &c.; and s. 347, p. 737, provides that any such person wishing for the stay, may have it by procuring some sureties to become bail for the payment of the judgment, interest and costs, at the expiration of the stay; and, if not so paid, s. 357, p. 738, requires that a joint execution issue, to be levied, first upon "the property of the defendant or defendants in the original judgment;" and, that proving insufficient, then "upon the property of the bail." These are all the provisions authorizing replevin bail, and they show plainly enough that the judgments made repleviable are those rendered against defendants in their personal capacities, which they are bound to pay absolutely

Nov. Term, 1853.

EGBERT v. THE STATE.

out of their own property. A judgment against an administrator, as such, to be paid out of the estate of the deceased, is not substantially, but merely nominally, a judgment against him. It is a judgment against the estate upon which he administers, and is never to be paid unless the estate is able to pay it. The administrator is not, by such a judgment, rendered absolutely liable for its payment. Such a judgment is not within the statutes authorizing replevin bail.

Nor should the law authorize the replevying of such a judgment. The administrator is allowed one year before he can be sued, to dispose of the personal property of the estate, and turn it into money; and if, after that time, he finds it necessary to proceed, and does proceed, against real estate, it appears from the cases of *Brown et al.* v. *Rose et al.*, 6 Blackf. 69, and *Brownfield* v. *Vail et al.* 7 *id.* 203, that the courts will stay proceedings on judgments against him, as administrator, whereon attempts are being made to reach that.

If, on the other hand, the administrator has in his hands, at the time judgment may be rendered, money with which it might be paid, he ought not to be allowed to stay the judgment six months, in order to speculate with the money himself.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. B. Niles, for the appellant.

D. S. Gooding, for the state.

HARTMAN *v.* KENDALL and Wife.

A. conveyed to *B.*, in 1833, a tract of land, and his wife, who was then only seventeen years of age, joined in the conveyance and acknowledged the same. In 1837, when she attained to her majority, *A.* died. She continued afterward to reside in the immediate vicinity until 1847, when she married *C.*, and lived with him near the land, until 1850, when a demand for an assignment of her dower was made, and, not being complied with, a bill was filed by her and her husband to have her dower assigned. When the conveyance was made by *A.*, the land was almost wholly unimproved; but *B.*, after his purchase, had been constantly and greatly improving it. *Held*, that, under the circumstances, the bill would not lie.

APPEAL from the *Hendricks* Circuit Court.

Thursday, December 1.

PERKINS, J.—Application by *Tubal* and *Rebecca Kendall* against *George Hartman* for an assignment of dower, to which it is claimed said *Rebecca* is entitled in lands now owned by said *Hartman*. It was decreed below that the dower should be assigned.

The facts of the case are these:

Michael Robbins, in *June*, 1833, conveyed the lands out of which dower is now claimed, to *Daniel Hartman*. *Rebecca*, now *Rebecca Kendall*, then *Rebecca Robbins*, was, at the time, the wife of said *Michael*, joined in the deed of conveyance to *Hartman*, and acknowledged the same. She was then, however, but seventeen years of age. The land conveyed was, at the time, almost wholly unimproved.

In 1837, the year in which said *Rebecca* arrived at majority, said *Michael Robbins*, her husband, departed this life. Said *Rebecca* continued to reside in the immediate vicinity of the land in question during her widowhood, which lasted ten years, and was terminated by her marriage, in 1847, with *Tubal Kendall*, a co-plaintiff in the present proceeding. The parties married lived in the near neighborhood of the land conveyed to *Hartman* till *August*, 1850, when a demand for an assignment of dower was made, which not being complied with, this proceed-

Nov. Term, 1853.

HARTMAN v. KENDALL.

ing was instituted, in 1851. The land, during the period *Hartman* had owned, and said *Rebecca* lived in close proximity to, it, had been constantly and greatly improved. Such are the facts.

The disability of infancy was not removed by the marriage of the plaintiff, *Rebecca*, with *Michael Robbins*, and, hence, it remained and may be taken advantage of in this case in the same manner as it may be in the case of a conveyance by a *feme sole* infant. *Bool* v. *Mix*, 17 Wend. 119.

The conveyance of land by an infant is voidable and not void.

Such conveyance, may, as a general rule, be avoided on the infant's arrival at majority. One of the modes in which the avoidance may take place is, by notice of intention to avoid, followed by a suit for possession. So far the law is settled in this state. *Doe* v. *Abernathy*, 7 Blackf. 442.

The question remains, within what time after the arrival of the infant at majority, must the avoidance take place?

It must take place in this state within twenty years, or the statute of limitations will be a bar. May circumstances estop a party from asserting the right of avoidance even within that time, and, if so, what are they?

In *Doe* v. *Abernathy*, *supra*, it is said that there is a "class of cases which hold that the right of disaffirmance must be exercised within a reasonable time, and that the omission so to exercise it will alone confirm the infant's conveyance. In *Holmes* v. *Blogg*, 8 Taunt. 35, it was remarked by *Dallas*, J., 'I agree that in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in a reasonable time,' &c.; and nearly the same idea was expressed by *Park*, J. In the case of *Kline* v. *Beebe*, 6 Conn. 494, it was held that the voidable acts of infants might be affirmed by the omission to disaffirm them within a reasonable time; and that the omission alone for eleven years to disaffirm an infant's deed,

was 'an acquiescence in the conveyance amounting to a tacit affirmance.' The same doctrine is distinctly recognized in *Richardson* v. *Boright*, 9 Verm. R. 368, and it has received the sanction of chancellor *Kent*, who says (2 Kent's Comm. 5th ed. 238), 'his (the infant's) confirmation of the act or deed of his infancy, may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence.'" But, it is added in the opinion quoted from, that the Court make no decision on the point, it not being required that they should by the facts of the case then under consideration, in which a female infant in *Pennsylvania* had made a conveyance of lands lying in *Indiana*, and afterwards married and joined with her husband in a suit to recover them, and wherein it "did not appear that Mrs. *Moore* [the infant who made the conveyance] was sole an instant after her majority, and possessed the power by her separate act to avoid her deed; nor did it appear that her husband acquiesced a moment in the contract after he knew she had made it." And the Court add further, that they do not "express any opinion of what would have been the effect of five years' acquiescence on the part of the lessors, had it appeared that they lived in the vicinity of the land in contest, with full knowledge of their rights, and with easy opportunity to notify the tenant in possession of their intention to disaffirm the conveyance made during nonage."

In the case now before the Court, there must be a decision as to the effect of thirteen years' acquiescence, by a party living in the vicinity of the land, with full knowledge of her rights, (for where the facts are known all are bound to know the law arising upon them) and with easy opportunity to notify the tenant in possession of an intention to disaffirm, and while improvements were being made by that tenant in the belief that his title was complete; and we think that effect is to preclude the grantor from exercising the right to avoid her deed. This strikes

Nov. Term, 1853.

HARTMAN v. KENDALL.

us as being the moral of the case on her part, and the justice of it towards the tenant in possession.

If a person seeks to avoid a contract on the ground of fraud, he must do it in a reasonable time after the fraud is discovered; else, by his delay and silence, he commits a fraud in turn upon the opposite party, by inducing him into a course of conduct he would not otherwise pursue. Why not, also, and for the same reason, if a person would avoid a contract on account of a disability, require that it should be done with reasonable promptness after the disability may be removed?

If a party, even an infant of years of understanding, according to some decisions, claiming a secret title to land, stand by and see it sold, or see another expend money upon it in the belief that there is no such secret title, and the party claiming knows that the money is so being expended, he may be estopped from asserting such secret title. Cannot this principle be properly applied in the case under consideration?

The view we take accords with the authorities cited in *Doe* v. *Abernathy*, *supra*, and would seem to be that to which the Court there inclined. It accords also with later decisions.

In *Cresinger* v. *Lessee of Welch*, 15 Ohio R. 156, it is held that lapse of time for a less period than twenty years, "in connection with other facts and circumstances, may amount to confirmation of the deed of an infant." In *Norris* v. *Vance*, 3 Rich. (S. C.) R. 164, it is decided that acquiescence after the infant arrives at maturity, may amount to confirmation; and in *Wallace's Lessee* v. *Lewis*, 4 Harrington (Del.) R. 75, it is said this privilege of avoiding his contracts by an infant should be "used with some regard to the rights of others, and, therefore, should be exercised within a reasonable time after full age, having regard to the circumstances of each particular case;" and in that case it was held that four years' delay amounted to an unreasonable time, and precluded the party from avoiding his deed.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the application for dower.

J. S. Harvey, for the appellant.

C. C. Nave, for the appellees.

Willard *v.* The State.

An indictment for retailing spirituous liquor charged that the defendant unlawfully bartered and sold, &c., one pint of spirituous liquor, but did not state, in terms, that the quantity sold was less than a quart. *Held*, that the charge was sufficient.

On the trial of the defendant for retailing, he offered in evidence the record of a former conviction for retailing, as evidence of a conviction for the same offence, but the evidence given at that trial was not set out in that record. The prosecuting witness testified that he had bought liquor from the defendant by a less quantity than a quart several times, but that he did not know and could not distinctly recollect that the time to which he then testified was any other or different from the time testified to by him in the said case in which the defendant had been convicted; but he further stated that the place where the liquor was sold was supplied with suitable bottles, liquors and fixtures for a bar; and that about the time of the selling in question, for a period of four weeks, he had drank at that bar habitually, some days as often as three or four times a day. *Held*, that the jury were authorized to infer that the offence charged was different from that on which he had before been convicted.

ERROR to the *Gibson* Circuit Court.

Thursday, December 1.

Stuart, J.—This was an indictment for retailing spirituous liquors without license. Trial by jury and verdict of guilty. Motion for a new trial overruled, and judgment on the verdict.

Two errors are assigned.

Nov. Term, 1853.

WILLARD v. THE STATE.

The first is, overruling the motion to quash the indictment.

The allegation which counsel deem defective, is, that *Willard* "unlawfully bartered and sold one pint of spirituous liquor," &c. It is not alleged, in so many words, that the quantity sold was less than a quart. But the allegation, as it stands, seems sufficient. A pint is a measure as well known as a quart. The one word is quite as definite as the other. An allegation that a pint was less than a quart could not be more explicit, and was, therefore, unnecessary.

If, in point of fact, the party sold the pint, not separately, but as part and parcel of a quantity more than a quart, to the same person at the same time, that was matter of evidence of which he could avail himself on the trial. The motion to quash was properly overruled.

The second error assigned is, overruling the motion for a new trial. The evidence is all set out in the record.

It appears that there were several indictments pending against *Willard* at the same term of the Court, for vending to the same person, on one of which he had been tried and convicted. The record in that case was given in evidence in the case at bar to prove a former conviction for the same offence. The witness testified that he had bought liquor from *Willard* by a less quantity than a quart several times; but that he did not know and could not distinctly recollect that the time to which he then testified was any other or different from the time testified to by him in case number one, in which *Willard* was already convicted.

The witness further stated, "that the place where the liquor was sold was supplied with suitable bottles, liquors and fixtures for a bar; that about the time of the selling in question, for a period of four weeks, witness had drank at that bar habitually, some days as often as three or four times a day."

The evidence given in the former trial was not set out in the record offered in evidence for the purpose of showing a former conviction.

Whether the former conviction was made out was a question for the jury. From the evidence of such repeated violations of the law, the inference might be safely indulged that the offence charged was different from that on which he had before been convicted.

Per Curiam.—The judgment is affirmed with costs.

J. G. Jones and *J. E. Blythe*, for the plaintiff.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

FISHER *v.* THE STATE. Two cases.

ERROR to the *Gibson* Circuit Court.

Thursday, December 1.

Per Curiam.—These cases were submitted on the same brief and involve the same principle of the case of *Willard* v. *The State*, *supra;* and for the reasons there given, are affirmed with costs.

HAND and Others *v.* TAYLOR.

Section 5 of article 7 of the constitution of 1851, which requires the Supreme Court, upon the decision of every case, to give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon, applies only to cases arising under that constitution.

Debt by the marshal of the *U. S.* for the district of *Indiana*, upon the bond of *A.*, a deputy marshal, for his taking insufficient replevin bail upon an execution. Plea, that the bail was, at, &c., a good and sufficient freeholder, and a good, able, and responsible surety, &c. Verification. Re-

Nov. Term, 1853.

HAND v. TAYLOR.

plication, concluding to the country. *Held*, that the burden of proof was upon the plaintiff, and that he was entitled to open and close the argument to the jury.

A plea to the declaration in said case was to the effect following: That the execution-defendants, at the time the writ of execution came to the hands of *A.* as deputy, were, and continued to be, and still were insolvent, and no part of the judgment could be made from their property, on the execution; and that *A.*, in executing the writ, and in taking said *B.* as bail, acted under the general instructions and customary practice of the marshal, in good faith, to take the best bail he could get for the benefit of the execution-plaintiffs, if the bail was reputed good; and that *A.* could not get other or better bail than *B.*, who was reputed good; and that he *bona fide* took *B.* as bail, and returned the bond with the same to the office, without any objection from the marshal or the execution-plaintiffs; and that after the replevin bond was taken and returned, the execution-plaintiffs accepted the same and issued execution thereon; and that the action against the marshal and sureties [for the taking of said bail] was tried and managed in all its parts by the marshal and sureties, a jury was improperly waived by them, and *A.* and his sureties were not notified of the same, and requested or tendered the sole and exclusive management thereof; and after said decision was had against the marshal and sureties, they wholly neglected and refused to take the case, for final decision, to the Supreme Court of the *U. S.*, although requested to do so by *A.* and his sureties. Verification. Special demurrer for duplicity, and the demurrer sustained. *Held*, that the demurrer was correctly sustained, not as a special demurrer for duplicity, but as a general demurrer for insufficiency.

In an action upon the bond of a deputy marshal and his sureties for the taking by the deputy of insufficient bail on an execution, the defendants, if notified of a suit against the marshal and his sureties for the taking of such bail, and authorized to plead and offer such evidence in defence of the action as they may desire, are concluded by the amount of damages recovered in the latter suit.

Where the evidence is not set out in the record, it will be presumed that the instructions given to the jury were pertinent and applicable to the case.

Thursday, December 1.

APPEAL from the *Marion* Circuit Court.

STUART, J.—Debt by *Taylor* against *Hand* and others, on their bond conditioned for the faithful performance of his duties as deputy marshal, &c., to which *Hand* had been appointed by *Taylor*. The defendants filed thirty-three pleas, leading to issues of law and fact. Trial by jury. Verdict and judgment for *Taylor*.

The declaration contains four counts.

The first alleges that *Taylor*, being *United States* mar-

shal for *Indiana*, in *March*, 1838, appointed *Hand* his deputy, who executed bond, &c.; that in *May*, 1839, *Suydam* recovered judgment, in the *United States* Circuit Court, for 670 dollars and 84 cents, against *Lasselle* and others; that in *June*, 1839, execution was issued and delivered to *Hand* as such deputy, to be executed; that, though there was property, &c., yet *Hand* wrongfully, without levy and without making the money, returned the execution indorsed that he had taken replevin bail, &c.; that the surety on the replevin bond was not responsible, but wholly insolvent. Whereby *Suydam* was unable to collect his judgment, &c. That *Taylor*, as marshal, by reason of the acts of his deputy, *Hand*, became liable to pay, and was actually compelled to pay to *Suydam*, the sum of 1,192 dollars and 34 cents.

The second count contains some additional particulars.

The third and fourth counts are similar, with the additional averment, that *Hand* and his sureties were duly notified of the pendency of the suit of *Suydam* v. *Taylor*, &c.

The number of pleas (thirty-three) has been already alluded to. Such an array of points to be decided, suggested the inquiry how far the constitutional provision requiring a statement of each question arising in the record, and the decision of the Court thereon, to be in writing, extends. For if that provision be applicable to this case, the opinion must necessarily occupy a large space in the reports; and, as we conceive, very unprofitably. The pleas are all of them familiar as constituting the chief staple of defence for years. The learning involved in these and similar pleadings, is a story thrice told in our own reports. It is not necessary that the bar and courts of *Indiana* should give any further evidence of their familiarity with the technicalities of the system that has passed away. That has been amply attested. We have clung to the ancient forms of administering justice in *Westminster Hall*, with a persevering accuracy perhaps unparalleled in judicial history; and that, too,

Nov. Term, 1853.

HAND v. TAYLOR.

long after they had been, in a great measure, banished even from the *English* courts.

We inquire, then, what cases are embraced in the constitutional provision requiring written opinions. If that provision is prospective, then the cases arising under the old constitution are to be decided as heretofore, in writing or otherwise, in the discretion of the Court. So that the fifth section of the seventh article may be paraphrased thus: The Supreme Court shall, upon the decision of every case arising under this constitution, give a written statement, &c. The provision being prospective, is, therefore, inapplicable to the present case. The same doctrine was, in substance, declared in the case of *The State* v. *Barbee*, 3 Ind. R. 258. There it was held that sections twenty-two and twenty-three of the fourth article, are to be construed as operating prospectively. No good reason is perceived why this sound rule of construction is not equally applicable to the whole instrument, unless where it is otherwise expressly provided.

But as counsel have narrowed down the controversy to a few points, and waived the others, we will briefly notice them in their order.

The first is as to the right to open and close, which, it is contended, the Court erroneously conceded to the counsel for *Taylor*. The question is made on the eighteenth plea. One of the breaches assigned is, that the replevin bail was insolvent. The eighteenth plea sets up, that the replevin bail was, at, &c., a good and sufficient freeholder, and a good, able and responsible surety for the payment of the amount demanded, &c., concluding with a verification. Replication concluding to the country.

On whom lay the burden of proving this issue? Clearly on the plaintiff, *Taylor*. It was indispensable to his recovery to prove the insolvency of the replevin bail; for that was the substance of the breach assigned. The plea does not relieve *Taylor* from that necessity. For it is not a plea in bar: it does not confess and avoid. It requires no proof to support it until the plaintiff has established the substance of the breach. It is a mere

informal denial of that breach: the plaintiff's proposition is denied by affirming the contrary to be true. Such pleading could not change the position of the parties from what it would have been had the insufficiency of the bail been directly denied. The plaintiff, then, having the initiative in the evidence, was entitled to the opening and close.

The case of *Jackson* v. *Pittsford*, 8 Blackf. 194, referred to by counsel, does not seem to support his position. On the contrary, it only decides that when there are several issues, and the proof of any one of them devolves on the plaintiff, he is entitled to the opening and close.

The second point insisted upon by counsel for *Hand*, is, that the Court erred in sustaining the demurrer to the fourteenth plea.

The plea is in these words, viz.: that "the said execution-defendants at the time the said writs of execution (which were one and the same writ) came to the hands of the said *Hand* as such deputy, were, and continued to be, and still are insolvent, and no part of said sums of money could be made from their property, on such execution; and the said *Hand*, in executing such writ and in taking said *Dillon* as bail, acted under the general instructions and customary practice of the said *Taylor*, his principal, in good faith, to take the best bail he could get for the benefit of the execution-plaintiffs, if such bail was reputed good. And the defendants aver, that said *Hand* could get no other or better bail than said *Dillon*, who was reputed good, and that he *bona fide* took said *Dillon* as such bail, and returned the bond with the same to the office, without any objection whatever, either from *Taylor* or said plaintiffs in execution; and the defendants further aver, that after said replevin bonds (which are one and the same bond) were taken and returned, the said plaintiff in execution accepted the same and issued execution thereon. And the defendants further aver, that said action against the said *Taylor* and sureties was tried and managed in all its parts by said *Taylor* and sureties, a jury was improperly waived by them, and the said *Hand* and sure-

Nov. Term, 1853.

HAND v. TAYLOR.

ties were not notified of the same and requested or tendered the sole and exclusive management thereof; and after said decision was had against the said *Taylor* and sureties, they wholly neglected and refused to take the case for final decision to the Supreme Court of the *United States*, although requested to do so by said *Hand* and his sureties. And this they are ready to verify, and, therefore, pray judgment, &c."

The demurrer to this plea was special for duplicity, and that it was argumentative, with specifications. It is not so clear that the special demurrer was well taken. According to the general current of authorities, a plea, to be bad for duplicity, should contain at least two substantive matters of defence, either of which, if separately well pleaded, would constitute a good bar to the action. *Porter* v. *Brackenridge*, 2 Blackf. 385.—5 *id.* 451.—8 *id.* 270. So it seems the pleading will be double which contains several answers, even if the matter be ill pleaded. Gould's Pl. 427.—Steph. Pl. 259.—*Purssord* v. *Peek*, 9 Mees. and Welsby 196. But it will be otherwise, says *Stephen*, if the matter pleaded be immaterial, or a necessary inducement to another allegation, or if the whole taken together constitute but one proposition or entire point.

A distinguished living authority in special pleading, has called our attention to a decision of Lord *Denman*, seemingly at variance with the rule. In *Wright* v. *Watts*, 43 Eng. Com. Law R. 645, *Denman* held that a second good defence in the same plea was not necessary to make it double; it was sufficient that the defendant appeared to treat the matter pleaded as affording a defence. But, on examination, the facts do not support the position; they constitute a double defence; and so they were regarded by other members of the Court. *Weightman*, J., delivers his opinion in the same case, thus: "There are clearly two defences. The defendant's counsel cites cases to show that one of these is ill pleaded; but that does not save the plea from being double." The rule as here-

tofore understood, seems, therefore, to remain unimpaired. Let us apply that rule to the fourteenth plea.

The insolvency of the execution-defendants, if available either as a defence or in mitigation of damages, was so in the action by *Suydam* v. *Taylor*. But it is not admissible between *Taylor* and *Hand*. The allegation that he acted in good faith, does not seem either material or issuable. The issue of execution, instead of operating as an acceptance of the bail, was but the exercise of proper diligence on the part of *Suydam*. It was a prudent step, favorable to *Hand* and his sureties; but it imported nothing which could avail them in this defence. That *Taylor* waived a jury, failed to appeal, &c., seems wholly immaterial. It is not anywhere alleged that *Hand* furnished *Taylor* with any matter of defence sufficient to bar *Suydam's* action in whole or in part, which *Taylor* had failed or refused to plead. *Hand* and his sureties having had notice of the suit in which *Taylor* was amerced for the delinquency of his deputy, we do not see how he can set up any matter here which he might have pleaded in bar or offered in mitigation of damages in *Suydam* v. *Taylor*.

It is conceived that duplicity is, therefore, not the chief defect of this plea; for there are not two substantial matters of defence set up in bar. As little do they form a connected proposition, supporting each other and tending to establish an entire defence. So that as the matters pleaded do not either singly or collectively constitute a good bar to the action, the demurrer was correctly sustained, not as a special demurrer for duplicity, but as a general demurrer for insufficiency.

The twenty-eighth and thirty-second pleas relied upon by counsel, are, in substance, as far as they go, identical with the fourteenth plea. The analysis and conclusion in that, are applicable to these.

The last point relates to the instructions given and refused. The following instruction given by the Court is excepted to, viz.:

If the jury find for the plaintiff upon the issues made

Nov. Term, 1853.

HAND v. TAYLOR.

on the pleas, the defendants are concluded as to damages by the judgment against *Taylor* and his sureties in evidence, &c.

It is contended that this is not the law as against the sureties of *Hand*, and, therefore, the judgment should be reversed. On this point several authorities are cited—one from our own reports, *The State* on the relation of *Fellows* v. *Johnson et al.*, which has been carefully considered. That was an action against the sheriff and his sureties, on his official bond. The sheriff not having been served, his sureties alone were on trial. It was held that the sureties of the sheriff were liable only for the damages actually sustained by *Fellows*, the relator. 1 Ind. R. 158. This is the law, and has a marked application to this case. The sureties of *Hand* were liable only for the damages sustained by *Taylor*. *Hand* and his sureties having had notice of the suit of *Suydam* v. *Taylor*, are presumed to have furnished such evidence on that trial as limited the recovery against *Taylor* to the damages actually sustained by *Suydam*. The judgment against *Taylor* being caused by *Hand's* delinquency and misfeasance as deputy marshal, no valid defence being put into the hands of *Taylor* by his deputy, becomes, as between *Taylor* and *Hand*, a matter adjudicated, behind which *Hand* and his sureties should not be permitted to go. If *Hand*, or his sureties, paid the judgment against *Taylor* to *Suydam*, since the recovery, that would be another question. Otherwise, the recovery against *Taylor* is the measure of his damages. The instruction given implies all that is claimed by the defence, and properly points the jury to the sources of evidence, should they find for *Taylor*. As the evidence is not set out, we must presume the instruction pertinent and applicable to the case made; and so, correctly given. 1 Greenl. s. 539.—12 Mass. R. 163.

The exception taken to the refusal of instructions, has already been anticipated in examining the fourteenth plea.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Nov. Term, 1853.

GILLUM v. DENNIS.

O. H. Smith, S. Yandes, H. Brown and *H. C. Newcomb*, for the appellants.

J. Morrison and *S. Major*, for the appellee.

GILLUM *v.* DENNIS.

If *A.* promises *B.* to do a particular thing for *B.*, in consideration of something to be done by *B.* upon the happening of a particular event, and such event may happen before the thing can be performed by *A.*, the undertakings of the parties are independent.

If *A.*, however, sues *B.* on his part of the contract, after the time fixed for the performance by *B.* of his part has elapsed, the case is in the same condition as if the undertakings had been dependent.

A full and faithful compliance with a contract is required by the rule that an agreement must be performed according to its terms as understood and assented to by the parties.

A. undertook, for a sufficient consideration, to keep four children of *B.*, for two years, and to board and clothe them. *Held*, that the parties must be presumed to have intended that the boarding and clothing, &c., were to be suitable to *A.*'s condition in life, and in accordance with the usages of the society in which he and his family moved.

ERROR to the *Clinton* Circuit Court.

Thursday, December 1.

DAVISON, J.—*Gillum* sued *Dennis* in assumpsit upon a contract in writing.

The declaration contains two counts. The first states the contract in accordance with its legal effect. The second sets it out in *hæc verba*. The contract, after stating the names of the parties, proceeds—That the above named *Jesse Dennis*, &c., does obligate himself, &c., to give the said *Robert T. Gillum*, &c., all the produce he can raise on the place or tract of land owned by said *Dennis*,

HARVARD LAW SCHOOL LIBRARY.

Nov. Term, 1853.

GILLUM v. DENNIS.

&c., for the term of two years from date; also a roan horse and 25 dollars in money; and also one-fourth of all the profits, after all the expenses deducted out, of the expedition to *California* of the said *Jesse Dennis*. And the said *Robert T. Gillum*, &c., does obligate himself, &c., to keep the four children (naming them) of said *Dennis* for the term of two years from date, for the above-named consideration, &c., to board and clothe said children, ordinary wear and unavoidable accidents excepted.

The contract is dated *February* 13, 1849. This suit was instituted on the 30th of *August*, 1851. It is averred that *Dennis*, at the date of the contract, was desirous of proceeding to *California;* that after making it, he completed his contemplated expedition and realized therefrom large profits, after deducting expenses, &c.; that the plaintiff performed the contract on his part, &c. The breach assigned is the non-payment of the 25 dollars, and the refusal of *Dennis* to account for and pay over to the plaintiff the one-fourth of the profits of the expedition, &c.

Plea, non assumpsit. Verdict for the defendant. Motion for a new trial overruled, and judgment on the verdict.

The Court instructed the jury as follows: "That the undertakings of the defendant in the agreement sued on are dependent, and not independent. That to entitle the plaintiff to recover, he must prove to the satisfaction of the jury his full and faithful performance of his part of the agreement. That by this agreement the plaintiff took upon himself the duties of a father to the children named in the agreement, and was bound to furnish them board, clothing, lodging, and everything else, and in every way take care of and provide for them in the same manner that a good father, having the means, would for his own children, without reference to the circumstances in life of either of the parties to the agreement."

Three objections are raised to this instruction:

1. Because it assumes that the undertakings of the parties are dependent.

2. Admitting that they were so, still it was not incum-

bent on the plaintiff to prove a full performance of his contract.

3. Because an erroneous construction was placed on the plaintiff's duties, &c.

The agreement stipulates that *Dennis* should at once deliver possession of the property and pay the 25 dollars. Upon the completion of his expedition to *California*, he was bound to pay over one-fourth of the profits, &c. The termination of that expedition was indefinite in point of time. It might have terminated before it was possible for *Gillum* to perform the agreement on his part. This shows that the undertakings were independent. Addison on Cont. 202.

But this view does not affect the instruction. The plaintiff failed to sue until the period within which he was to perform had expired. Hence, this case stands on the same ground on which it would have stood had the promises been dependent. 7 Blackf. 408.

As to the mode of performance, the rule is, "that an agreement must be performed according to its terms, as understood and assented to by the parties." Story on Cont. 404. A full and faithful compliance with a contract, comes within the rule just stated. In our opinion, the instruction, in that respect, was not erroneous.

The third objection is well taken. The language used by the Court relative to the duty imposed on the plaintiff, does not express the meaning of the contract. Without attaching any importance to the terms, "ordinary wear," &c., we think that boarding and clothing, &c., suitable to the defendant's condition in life, and in accordance with the usages of the society in which he and his family moved, was intended by the parties. The position assumed by the Court, that the plaintiff was bound to furnish board, &c., "without reference to the circumstances in life of either of the parties," cannot be sustained. Therefore, that branch of the instruction was erroneous, and the judgment must be reversed.

Nov. Term, 1853.

SPEAKMAN v. SPEAKMAN.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. F. Suit and *R. Jones*, for the plaintiff.

H. S. Lane and *S. C. Willson*, for the defendant.

SPEAKMAN and Others *v.* SPEAKMAN and Others.

A. being seized of the undivided three-fourths, and his wife of the undivided one-fourth, of a tract of land, they conveyed it to *B.* The latter gave his notes for the purchase-money payable to *A.*, and a mortgage to *A.* to secure the payment of the notes. *B.* also executed a bond, whereby he bound himself to re-convey the land to *A.* if he failed to make the first payment,—*A.* having the right, in case of such failure, to cancel the contract and take back the land to himself. *B.* having failed to make the first payment, and become a bankrupt, *A.* filed a bill against his assignee in bankruptcy, &c., setting up the contract and praying for a re-conveyance of the land, and the Court rendered a decree that the assignee should convey the land to *A.*, which he did. *Held*, that upon failure to make the first payment, the property, by virtue of the bond, vested in equity in *A.*, and not in *A.* and wife according to their original interests therein.

Thursday, December 1.

ERROR to the *Dearborn* Circuit Court.

DAVISON, J.—Bill in chancery. The complainants were the children of *Stephen S. Speakman* and *Mary*, his first wife, both of whom are deceased. *Sarah Speakman*, his second wife, and their children, being the issue of the second marriage, are the defendants.

The cause was submitted on the bill, answers, exhibits and depositions. The Court, upon final hearing, dismissed the bill.

The facts are believed to be as follows:

Stephen S. Speakman owned the undivided three-fourths, and *Mary*, his first wife, the undivided one-fourth of a tract of land in *Dearborn* county. They sold and conveyed it to one *Thomas Folbre*. At the time of the conveyance,

Folbre gave his notes for the purchase-money, being 7,150 dollars, payable to the said *Speakman*. A mortgage was also given to him, to secure the payment of the notes; and *Folbre* executed a bond, whereby he bound himself not to cut timber, &c., and to re-convey the land to *Speakman* if he failed to make the first payment; *Speakman* having the right, in case of such failure, to cancel the contract and take the land back to himself, should he desire to do so. *Folbre* failed to pay any part of the purchase-money, but applied for and obtained the benefits of the bankrupt law; and one *Henry Walker* became his assignee in bankruptcy. *Speakman* filed his bill in chancery against *Walker*, the assignee, &c., and others, in which he set up the aforesaid sale, mortgage and bond, averred the non-payment of the purchase-money, and prayed the Court to decree a re-conveyance of the land to him, and for general relief, &c. A decree passed directing *Walker*, the assignee, &c., to convey the land to *Speakman*, in accordance with the stipulation in *Folbre's* bond; which was done. The contracts relative to the sale of the land were made in 1839. *Mary Speakman* died in 1841, and the proceedings in chancery took place in 1843.

The present bill prays that one equal undivided one-fourth of said land be set apart to the complainants as heirs, &c., of said *Mary*, or that it be sold for the payment of the purchase-money, or such portion thereof as may be coming to them.

Stephen S. Speakman died seized of the premises. Then, the inquiry arises: What are the respective rights of the parties? Are the plaintiffs entitled in equity to one-fourth of the land in right of their mother, or does the whole tract descend equally to all his children? The effect of the conveyance to *Folbre*, and of his contract to re-convey must govern the solution of this question. By the deed from *Speakman* and wife, the whole legal and equitable title to the land described in it, vested in the grantee. *Talbott* v. *Dennis*, 1 Ind. R. 471. It must be conceded that the notes and mortgage were *Speakman's*

Nov. Term, 1853.

SPEAKMAN v. SPEAKMAN.

property. Had he died intestate while he possessed them, they would have passed to his administrator. Coote on Mort. 529. What, then, was the purpose of the bond? It stipulates that *Folbre*, in case he failed to pay the first note, should re-convey the premises to *Speakman*, should he desire a conveyance. *Speakman* also reserved the right, in the event of such failure, to cancel the contract and take the land back to himself. What was intended by this reservation is not obvious. Nor is it an important inquiry in this case. The contract of sale never was cancelled, in the legal import of that term. Had it been cancelled, or had a re-conveyance been made to both vendors, then the title would have been left as it stood before the sale; but this has not been done. The deed from *Speakman* and wife was not affected by the decree directing a conveyance to him. It is still in force, and constitutes a link in the chain of title to the premises. This could not be so, if it was cancelled.

The plaintiffs insist there is but one question in the case. It is this: If tenants in common convey land belonging to them, and the grantee, at the time of the conveyance, stipulates in writing, that if the purchase-money be not paid by a day named, the contract shall be cancelled, and that he will re-convey the land to one of the tenants in common, and the contract is accordingly cancelled and the land re-conveyed to such tenant, whether such conveyance does not inure to the benefit of both? The position assumed in this inquiry does not, in our opinion, apply to the case before us. The contract of sale to *Folbre* never was cancelled. And whether such conveyance would so inure might depend on the terms of the stipulation as understood and assented to by the parties. In this case, *Mary Speakman* was a party to the sale and conveyance of the land. Therefore, it must be presumed that she knew of, and assented to, the contract of re-conveyance. There is nothing in the record tending to rebut this presumption. Then she intended just what the whole contract imports, viz.: if *Folbre* failed to make the first payment, *Speakman* was to have the land

in fee, in lieu of the purchase-money; or if a conveyance of it was not desirable, he might enforce payment of the notes and mortgage.

But, it seems to us, the law arising upon the facts presented by the record, is fully stated in *Talbott* v. *Dennis*, *supra*. That case is in point. And upon its authority the decree of the Circuit Court must be affirmed.

Per Curiam.—The decree is affirmed with costs.

J. Sullivan, for the plaintiffs.

P. L, Spooner, for the defendants.

Cooper *v.* Butterfield.

A court of chancery will not interfere to correct a clerical mistake made by the clerk in entering a judgment of a court of law; nor to restrain proceedings for the enforcement of the judgment—except that perhaps, in a case of emergency, where an execution has issued in vacation and a levy and sale are threatened, a temporary injunction might be granted to restrain the proceedings until the next term, to give the party an opportunity to make his application to the Court that rendered the judgment to correct the alleged mistake.

Friday, December 2.

ERROR to the *Allen* Circuit Court.

Roache, J.—*Butterfield* filed a bill in chancery against *Cooper*, and one *Johnson*, who died pending the suit, for the purpose of obtaining an order restraining them from levying an execution issued upon a judgment at law.

The bill alleges, that at the *July* term, 1846, of the *Allen* Circuit Court, the State of *Indiana*, on the motion of *Cooper* and *Johnson*, had an attachment for an alleged contempt issued out of said Court, and served on the complainant, from which he was, at the same term, dis-

Nov. Term, 1853.

COOPER v. BUTTERFIELD.

charged without the payment of costs. The ground of the relief sought for was, that the clerk, in making the entry on the record, by mistake, entered up a judgment against the complainant for the costs of the attachment; and that *Cooper* and *Johnson* had caused an execution to be issued on such erroneous judgment, and placed in the hands of the sheriff for collection.

An injunction was granted by the president judge in vacation. At the subsequent term, the defendants below moved a dissolution, but the motion was overruled.

The defendants then answered, denying all the substantial parts of the bill, and insisting that the judgment was correctly entered.

The cause went to a hearing, and the injunction was made perpetual.

This was erroneous. If the entry were erroneous, the Court which rendered the judgment had ample power to correct it. The bill alleges no reason, and the evidence shows none, why the complainant below could not have availed himself of the power of the Court of law, to correct the mistake, if any could be shown to exist, according to the usage and practice of that Court. He might have made his motion for that purpose, and, if improperly overruled, this Court was open to him to revise the decision. A court of chancery will not interfere to correct a clerical mistake made by the clerk in the entry of a judgment of a court of law; nor to restrain proceedings for the enforcement of such judgment. 3 Dan. Ch. Pr. 1840.—*Raburn* v. *Shortridge*, 2 Blackf. 480.—*The State Bank of Indiana* v. *Young* and others, 2 Ind. R. 171.

In case of an emergency, when an execution was issued in vacation, and a levy and sale were threatened, it would, perhaps, be competent to grant a temporary injunction to restrain the proceedings until the next term, to give the party an opportunity of making his application to the Court rendering the judgment, for the correction of the alleged mistake.

Per Curiam.—The decree is reversed with costs.

H. Cooper, for the plaintiff.

W. March, for the defendant.

Nov. Term, 1853.

SLEVIN v. MORROW.

4 425
126 491
4 425
183 502

SLEVIN and Others *v.* MORROW and Others.

A creditor who receives the notes of third persons, properly indorsed to him, as collateral security for a debt, knowing the makers to be in doubtful circumstances, is bound to use reasonable diligence to collect them, or show some excuse for not doing so, but extraordinary diligence is not required.

If the creditor, through his laches, fails to realize the money on the notes, the debtor has the right to treat the notes as a satisfaction, so far as they go, of the debt.

The finding of the Court, sitting as a jury, is conclusive in the absence of a clear preponderance of evidence.

ERROR to the *Franklin* Circuit Court.

Friday, December 2.

ROACHE, J.—Debt by the plaintiffs in error against the defendants, on two promissory notes. Plea, the general issue, with an agreement to give in evidence under it all matters which could be proved under any special pleading.

Trial by the Court, which found for the defendants. Motions for a new trial and in arrest of judgment overruled, and judgment on the finding.

It appears from the evidence, which is set out in a bill of exceptions, that the defendants placed two notes in the plaintiffs' hands, the proceeds of which, when collected, were to be applied to the payment of the notes sued on. The first note was on one *Wright*, and was given to them on the 15th of *June*, 1848. In *January* or *February*, 1849, a second note on one *Lovell*, for 400 dollars, was transferred. Both notes were indorsed in blank by the defendants, for the purpose of enabling the plaintiffs to collect them. Shortly after receiving the first note on *Wright*, the plaintiffs called on him, and received no money, but were promised payment at a future time. No further attempt to collect it is shown. At the time of the trial below, *Wright* had died insolvent. No steps seem to have been taken to collect the *Lovell* note.

The defendants insist that both *Wright* and *Lovell* were solvent at the time of the transfer of the notes, and for

Nov. Term, 1853.

SLEVIN v. MORROW.

sometime afterwards, and that the plaintiffs might have realized the amounts by using proper diligence.

On this point, the testimony was somewhat conflicting. *Wright* was the owner and master of a canal-boat on the *White Water Valley* canal, and was at *Cincinnati*, where the plaintiffs resided, several times after the note was transferred.

Lovell was in embarrassed circumstances, but had some property in his hands; had a mill and was manufacturing lumber. The plaintiffs do not appear to have ever called on him, or made any attempt to collect the money on his note. In the spring of 1850, *Lovell* went to *California*, and left no property whatever.

It is further in proof, that at the time the note on *Lovell* was transferred, the defendants told the plaintiffs that he, *Lovell*, had been unfortunate, and lost a great deal, but was an energetic man, and would struggle harder to pay the note when he knew it was in the hands of plaintiffs.

The law arising on the questions presented by this state of facts, is well settled.

These notes were taken by the plaintiffs as collateral security, to be applied in payment of their claim, when collected. They were indorsed in blank, for the purpose of enabling them to effect the collection; they took and retained possession of the notes up to the time when, as they allege, it had become impossible to make any sum off the debtors in those notes. Under such circumstances, it was their duty to use reasonable diligence to secure their payment.

They were aware of the embarrassed circumstances of the parties, and cannot be excused from the obligation of taking the ordinary process for the collection of the claim. At least one term of Court intervened between the transfer of the notes and the death of *Wright* and the departure of *Lovell* for *California*. The plaintiffs were apprised that the debtors were in dubious circumstances, and the notes being in their possession, it was out of the power of the defendants to take any legal steps for their collection. By taking and holding the notes, under such cir-

cumstances, they imposed on themselves the obligation to use reasonable, but not extraordinary diligence. *Lawrence* v. *McCalmont*, 2 How. U. S. 426.—*Kiser* v. *Ruddick*, 8 Blackf. 382.

The plaintiffs contend, however, that it was sufficiently established that *Wright* and *Lovell* were insolvent.

On this point, the evidence was somewhat conflicting; but it was a question necessarily involved in the finding of the Court. If the insolvency had been established, it would undoubtedly have relieved the plaintiffs from the necessity of taking any steps for the collection of the notes. It being a question of fact, directly in dispute, and necessarily involved in the finding of the Court, the finding is conclusive in the absence of a clear preponderance of evidence against it. The transfer of the notes in question was not an absolute payment of the original indebtedness, but, when the holder fails to realize the money, through his own laches, his debtor has a right to have it considered as a satisfaction of his debt. Hence, it was incumbent on the plaintiffs in the present case to show, either that they had used reasonable diligence in attempting to collect them, or some excuse for their failure to do so.

The first is a question of mixed law and fact: the latter one of fact simply. The finding of the Court is against them on both, and must, under the state of evidence, be held to settle both against them. There is no preponderance of proof which would justify us in disturbing this finding.

Per Curiam.—The judgment is affirmed with costs.

G. Holland, for the plaintiffs.

J. D. Howland, for the defendants.

Nov. Term, 1853.

THE STATE v. SHAW.

THE STATE *v.* SHAW.

The fact that a party recognized for a crime by a justice of the peace has been subsequently recognized by the same justice upon another charge, for a matter which was part of the same transaction, will not discharge the first recognizance.

Where a complaint made before a justice of the peace shows that the act charged might be either of several crimes, the justice may elect for which he will recognize the party, and a recognizance to appear and answer for either will be valid.

Friday, December 2.

ERROR to the *Jefferson* Circuit Court.

PERKINS, J.—*Scire facias* on a forfeited recognizance against *Charles G. Shaw* and others, sureties for the appearance at a term of the *Jefferson* Circuit Court, of *Thomas Holtzclaw*, to answer, &c.

Pleas—

1. *Nul tiel record.*

2. That the said *Thomas* was, on the 16th day of *May*, 1850, brought before one *Milton Stapp*, mayor of the city of *Madison*, and, *ex officio*, justice of the peace, upon a charge of having committed an assault and battery upon one *Joseph Howard*, with intent to murder, and, on the hearing of said charge, was recognized to the Circuit Court to answer for obstructing legal process; and, afterwards, on a subsequent day, was charged before said *Stapp*, in another affidavit, with having murdered said *Howard*, and was recognized in another recognizance, for that offence, which was the same transaction, offence and breach of the peace, for which said *Thomas* had been recognized in the recognizance for obstructing legal process; and after said second recognizance, he, said *Thomas* was suffered by his sureties therein to go at large.

3. That on the 16th day of *May*, 1850, one *Joseph Howard* appeared before said *Milton Stapp*, mayor and justice as aforesaid, and made oath that he had been shot by one *Henry Holtzclaw* with intent him, the said *Howard*, then and there to kill and murder; and that the said

Thomas and others were then and there present, aiding and abetting said *Henry*, and whilst said *Howard* was engaged in the discharge of his duty as a constable of said county; and that, thereupon, said *Thomas* and others were arrested and brought before said *Stapp*, and an investigation of said charge had, upon which, without any other charge having been made before him against said *Thomas*, and without the said *Thomas* having committed any offence whatever in the view of said *Stapp*, he required the said *Thomas* to enter into the recognizance in said *scire facias* mentioned, &c., which was to answer for obstructing the service of process.

Demurrers to the second and third pleas overruled, and final judgment rendered for the defendants.

We think the Court erred in overruling the demurrer to the second plea. It shows no excuse for failing to produce *Holtzclaw* at Court to answer. The fact that he was subsequently arrested on another charge, and bailed and suffered to go at large, constitutes no defence. That did not prevent the present defendants from taking him into custody, at any time, upon a bail-piece; nor did it deprive them of any right they possessed as bail. If, at any time, even while he was in custody upon the second charge, they had wished to exercise the privilege allowed them of surrendering him up and releasing themselves, it was in their power to do so, and the writ of *habeas corpus* was at their command in aid of the surrender, if it was needed. The second proceeding against *Holtzclaw*, set up in the plea, may have been resorted to, and probably was, as a mode of getting additional security to that already given, it being discovered that he might be guilty of a higher crime than that for which he had been recognized; and in taking which additional bail, that already given may have been considered; and if that bail had not wished that such should be the case, a surrender should have been made, that the recognizing magistrate might act advisedly. In the *People* v. *Stager*, 10 Wend. 431, it is decided that, if, "after a recognizance is entered into, the party charged is arrested upon a bench-warrant

Nov. Term, 1853.

THE STATE v. SHAW.

issued upon an affidavit for the same offence," the bail are discharged; but that presents an entirely different case from the present. It may be regarded as showing, in effect, a surrender, in the particular case, by order of the Court.

We think the Court erred also, in overruling the demurrer to the third plea. That plea was put in under the idea that a justice of the peace has no power to recognize an accused person to answer for any crime except the particular one named in the affidavit to procure his arrest. We are not prepared to admit the doctrine. We should be unwilling to decide that if a man was arrested upon a charge of murder, he could not be recognized for manslaughter, should the evidence induce the justice to believe that that was the grade of the crime committed. In the Circuit Court, if a party is charged with one offence, and, on the trial, the evidence shows him to be guilty, not of that, but another, the Court will order him into custody till he can be arraigned for such other. And so on an examination before a magistrate, should the evidence satisfy him that a crime different from the one charged had been perpetrated by the accused, he surely might hold him in custody till an affidavit fitting the case could be made, and then recognize him upon it. That he would be bound to do so, we do not here decide, as it is not necessary to express an opinion on the point. In the case before us, the magistrate did not travel beyond the charges contained in the affidavit upon which the arrest was made, as the plea clearly shows. It states that *Howard* made oath that he had been shot whilst engaged in the discharge of his duty as constable, &c.; showing in the affidavit that the act might fall under the definition of some one out of, perhaps, three crimes, and, hence, leaving it for the examining justice to determine the particular one from the evidence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. W. Chapman, for the state.

J. G. Marshall, for the defendant.

Nov. Term, 1853.

THE STATE *v.* SHANNON.

ERROR to the *Jefferson* Circuit Court.

Per Curiam.—This case is like the preceding case of *The State* v. *Shaw;* and, for the reasons there stated, the judgment is reversed with costs, and the cause remanded, &c.

J. W. Chapman, for the state.

J. G. Marshall, for the defendant.

NULL and Another *v.* THE WHITE WATER VALLEY CANAL COMPANY.

NULL v. THE WHITE WATER VALLEY CANAL COMPANY.

Friday, December 2.

The internal improvement act of 1836, except so far as it conflicts with the acts transferring the various public works, has not been repealed; and the Supreme Court has constantly regarded it as entering into and forming a part of the various acts conveying away, for construction, the public works, so far as consistent with those acts.

A proceeding properly instituted for the recovery of a claim, but voluntarily abandoned, cannot be made available, in an action subsequently brought, to save the claim from the bar of the statute of limitations.

The *White Water Valley Canal Company*, in 1845, took possession of certain land of the plaintiffs, for the construction of their canal, and, in the prosecution of the work, diverted water from his mills. In about eighteen months afterward, the water was returned to the plaintiffs, and to its natural channel, by a freshet that washed away the canal; but the company, in 1849, in repairing the canal, again diverted the water as they had previously done. *Held*, that the statute of 1836, enacting that applications for damages for property taken for the construction of the public works, should be made within two years next after the same was taken possession of, or they should not be paid, commenced running at the first diversion of the water in 1845.

That statute is not founded upon the presumption that the damages have been actually paid within the two years, but upon the ground that two

Nov. Term, 1853.

NULL v. THE WHITE WATER VALLEY CANAL COMPANY.

years is a reasonable time for asserting the claim, and that, if it is not asserted in that time, it should be disregarded, and the cost of the public works thereby lessened.

The legislature had the power to enact such a law.

Where private property is taken for public use under the authority of a statute which points out the mode in which compensation shall be made therefor, that mode, and no other, under the constitution of 1816, could be pursued to obtain such compensation.

The reason of this rule is, that as the law authorized the property to be taken, the corporation appropriating it committed no wrongful act, and hence the common-law doctrine as to cumulative remedies is not applicable.

Friday, December 2.

ERROR to the *Fayette* Circuit Court.

PERKINS, J.—*Israel* and *Michael Null* brought an action on the case against the *White Water Valley Canal Company*, for damages done by said company to lands and mills of the plaintiffs in the construction of the *White Water* canal.

The different counts in the declaration all alleged the damages to have been committed in 1845 and in 1846, and that applications were made for compensation, &c. This suit was instituted in *March*, 1850.

The defendant pleaded the lapse of two years from the time of committing the acts complained of, before the commencement of this suit, in bar.

The plaintiffs replied, as to the injuries complained of in two of the counts in the declaration, by a re-assignment, stating that about eighteen months after the first construction of the canal through, and to the injury of, their property, the water diverted from them by that construction, was returned to them, and to its natural channel, by a freshet that washed away the canal; that the company, in 1849, on repairing the canal, again diverted the water, &c., to their damage, &c., and that these were the injuries in said counts complained of, &c.

Demurrers were filed and sustained, so that final judgment on the whole case was rendered in favor of the defendant, the canal company.

We shall examine no technical question on the pleadings.

The first inquiry will be as to the validity of the plea setting up the failure for two years to bring suit.

The general internal improvement act of 1836, R. S. 1838, p. 337, enacted, in section 17, that no claim for damages occasioned by the construction of the works provided for, should be recovered or paid, unless the application therefor was made "within two years next after the property shall have been taken possession of," &c. The state commenced the construction of several of the works specified in said act, but failed before she had completed them. Subsequently, the works, in their unfinished condition, with the materials on hand, relinquishments of rights of way, &c., were transferred by the state to different persons or corporations, for the purpose of having them completed as projected by the state, or in a manner somewhat modified; the state in some, if not in all of the cases, reserving the right to redeem them at a future day. The internal improvement act of 1836 was not repealed any further than it conflicted with the several acts transferring the various works, and it yet remains in force; and this Court has constantly regarded it as entering into and forming a part of the various acts, in some cases by the express terms of said acts, so far as consistent with them, passed at different times, conveying to others, for construction, the public works of the state. This has been repeatedly held in reference to the *White Water Valley Canal Company*. See the cases of this *Company* v. *Boden*, 8 Blackf. 130, and against *Ferris*, 2 Ind. R. 331; and *Hankins* v. *Lawrence*, 8 Blackf. 266. It has once been held in respect to the *Wabash* and *Erie* canal. *The Trustees of the Wabash and Erie Canal* v. *Johnson*, 2 Ind. R. 219. We think the plea in question a good bar to the action, unless the circumstances appearing in the record take this case out of the statute on which the plea rests.

It is alleged that a claim for damages had been made within the two years, and that the company had professed a willingness to have it adjusted and settled. But the claim seems to have been voluntarily abandoned by the plaintiffs, and it does not appear that they ever, them-

Nov. Term, 1853.

NULL v. THE WHITE WATER VALLEY CANAL COMPANY.

selves, which under the charter they should have done, selected an arbitrator to act in determining upon it. They do not show, therefore, that the company was placed in any default in the premises, nor that any excuse existed on the part of the plaintiffs for failing to comply with the statute; and a properly instituted claim voluntarily abandoned, cannot be made available in a subsequent action to save it from the operation of the statute of limitation. *Alexander* v. *Pendleton*, 8 Cranch 462.—R. S. 1852, vol. 2, p. 77.

It is further said, that the water, by a freshet, was returned, some eighteen months after it was taken possession of by the company, to the use of the plaintiffs, and that this suit was instituted within two years from its recovery back by the company. We do not think this circumstance has any weight in the case. We think the two years must commence running from the first appropriation of the water in 1845. It was then taken by the company, not as a wrong-doer, but by authority of law, and with the intent and purpose of absolute appropriation and permanent enjoyment, and so the plaintiffs must have understood at the time. That appropriation has never been voluntarily relinquished—never been abandoned. A superior force wrested the water temporarily from the company, but it was recovered as soon as it reasonably could be, not as a new appropriation, a new possession, but in right and continuation of the former, and so the plaintiffs must have regarded it.

Again, it is urged that the company admitted that the damages had not been, but ought to be, paid within two years, &c.; and it is claimed that a new promise has been made taking the case out of the statute. In construing the statutes of limitation upon the recovery of demands growing out of the ordinary dealings among men, the idea has prevailed that those statutes were based on the presumption that the debts covered by them had been paid, and that, hence, an acknowledgment in respect to any given debt, that it had not been paid, should take it out of the statute. But the statute in this case is

not based upon the presumption that the damages have been paid. It rests on the ground that two years is a reasonable time for asserting a claim for damages; and that a party is not necessarily entitled to any more; and that, if the claim is not asserted in that time, it shall be disregarded, and the cost of constructing the public works thereby lessened. Hence, it enacts that no claim of the kind shall be paid, unless asserted within two years. It would seem, therefore, that an admission, made afterwards, that the damages had not been paid, could not take the case out of this statute, for the object of the statute was to secure prompt settlements of these damages, or to get rid of paying them by the mere lapse of time. The legislature had power to enact such a law. But we shall not decide whether there is anything upon the record that can take the case out of the statute or not, as there is another point which is fatal to the present suit. It is, that where private property was taken for public use under authority of a law which pointed out the mode in which compensation should be made therefor, that mode and no other, under the old constitution, was necessarily pursued to obtain such compensation. *Kimble* v. *The White Water Valley Canal Company*, 1 Ind. R. 285. This was on the ground that there was no wrongful act, in such cases, on the part of those taking the property, which could be made the subject of an action against them, as the law, valid under the late constitution, authorized them thus to act, and the only right of the individuals whose property was so taken, was to have compensation to be ascertained in the manner pointed out in the act. See the cases cited in note to *Kimble* v. *The White Water Valley Canal Company*, *supra*. The common-law doctrine of cumulative remedies is not, therefore, applicable in these cases.

Per Curiam.—The judgment is affirmed with costs.

S. W. Parker, *J. Ryman* and *J. Perry*, for the plaintiffs.

J. S. Newman, *J. Rariden*, and *C. H. Test*, for the defendants.

Nov. Term, 1853.

FAIRMAN v. FARMER.

FAIRMAN v. FARMER and Another.

The R. S. 1831 permitted the payee of a note to proceed at law on the note, and in chancery on a mortgage given to secure it, at the same time; but a satisfaction of either the decree or judgment was a satisfaction of both.

An assignment of a decree of foreclosure was as follows: For value received, I assign my interest in the above decree to *A. B.*, with the interest thereon. *January* 11, 1841. (Signed) *C. D.* *Held*, that, whatever might be the legal effect of the assignment, it was sufficient to empower *B.* to control the decree, collect it, and receipt for it.

Friday, December 2.

APPEAL from the *Tippecanoe* Circuit Court.

STUART, J.—*Scire facias* dated *June* 22, 1849, to revive a judgment. The *sci. fa.* alleges that on the 27th of *February*, 1839, *Fairman* recovered a judgment against *Farmer*, in the *Tippecanoe* Circuit Court, for 791 dollars and 74 cents. That on the 16th of *March* following, a *fi. fa.* issued; and that, on the 26th of the same month, *Cole* executed a replevin bond, which, with the execution, was returned by the sheriff, and the bond duly recorded. That execution of the judgment had not been made, but that the same remains unsatisfied.

Cole and *Farmer* filed five pleas. The first plea alleges that the judgment was founded on a promissory note for 773 dollars and 49 cents, dated *February* 2, 1837, payable twenty-two months after date, to one *Isaac Harter*, and by him assigned to the plaintiff, *Fairman*. That said note, and another of a larger amount, were secured by a mortgage made by the defendant, *Farmer*, to said *Harter*, of part of a lot in the town of *Lafayette*. That in *June*, 1840, the plaintiff, together with the *Lafayette Insurance Company*, who held the larger note, filed their bill in chancery to foreclose the mortgage. On this bill that the complainant, *Fairman*, had a decree for 907 dollars and 32 cents. That in *January*, 1841, the complainant assigned his interest in the decree to one *Stockton*, and that in *March*, 1841, the defendants paid to *Stockton* 329 dollars and 83 cents. That afterwards, and before the issue

of the *sci. fa.*, *Farmer* paid *Stockton* 100 dollars in a buggy, harness, and chairs, and that on receipt of these, *Stockton* executed to *Farmer* a receipt in full satisfaction of his interest in the decree.

The second plea is similar to the first, with some additional particulars, and avers that the buggy, &c., were received in full satisfaction of the decree.

The third plea does not vary materially from the first and second.

The fourth and fifth pleas are not before us for consideration.

The three several replications to these pleas are in substance the same, and may be stated thus: That as to 230 dollars of said judgment, the plaintiff, before the assignment to *Stockton*, viz., in *July*, 1839, assigned that sum, part of said judgment, to one *Ellis*, on the final record, &c.; that *Ellis*, in *March*, 1842, assigned to *Philip Harter*, and in *May*, 1849, *Philip* assigned back to the plaintiff; that as to the remainder of the judgment, except 329 dollars and 83 cents, made by sale of the mortgaged premises, the plaintiff meant and intended by his assignment to *Stockton*, to transfer the right to that sum only; and that the assignment to *Stockton* was made in consideration of the payment to plaintiff of 295 dollars only.

To the replications to the first, second and third pleas, the defendants filed their general demurrers. Demurrers sustained, and judgment for the defendants. *Fairman* appeals.

The law which governed the mortgage (statute of 1831) permitted the payee of the note to proceed on his note at law and on his mortgage in chancery, at the same time. But a satisfaction of either the decree or the judgment was a satisfaction of both. The assignment of the decree to *Stockton* is in these words: "For value received, I assign my interest in the above decree to *Lawrence B. Stockton*, with the interest thereon. *January* 11, 1841. *Loyal Fairman*." We can only look to this assignment for what the parties intended. Here is no reservation; nor is there anything in the record to qualify its force.

Nov. Term, 1853.

GOODWIN v. BLACHLEY.

Whatever its legal effect, it was at least sufficient to empower *Stockton* to control the decree, collect it, and receipt for it.

This *Stockton* had done prior to the issuing of the *scire facias*. There is no allegation of bad faith on the part of *Cole* and *Farmer* in the payment of the decree to *Stockton*. He was duly authorized to receive it; and the payment, on their part, was but the discharge of a legal obligation. The receipt of the mortgage by *Stockton* discharged the debt. The demurrers to the replications were correctly sustained.

Per Curiam.—The judgment is affirmed with costs.

Z. Baird, for the appellant.

GOODWIN *v.* BLACHLEY and Others.

A person who has formed an opinion on the merits of a cause from information derived from conversation with the witnesses, is incompetent to sit upon the jury.

The objection that a verdict is contrary to evidence meets with little favor in the courts, if there is any evidence from which a jury might fairly infer the fact ascertained by their verdict; but where the evidence in the record is not sufficient to support the verdict, it ought not to be sustained.

Friday, December 2.

ERROR to the *Henry* Circuit Court.

STUART, J.—Debt on note for 438 dollars, purporting to be made by *Goodwin* and others. Plea, the general issue, sworn to. Trial by jury. Verdict and judgment for *Blachley & Co.* *Goodwin's* motion for a new trial having been overruled, he excepted and set out the evidence.

Three grounds of objection are assumed by counsel for *Goodwin*:

1. That one of the jurors was disqualified.

2. That the finding was contrary to evidence.

3. That certain instructions were erroneously given, and others erroneously refused.

The first question arises thus: One of the jurors being sworn and examined touching his competency, said he had heard a statement of the facts from a part of the witnesses; "but that his opinion would readily yield to the evidence, and he believed he could hear and determine the case as impartially as if he had never formed any opinion on the subject; that if the evidence should turn out as he had heard it, he thought his opinion would be the same as formerly; but that he would determine the case from the evidence here, and not from what he had previously heard." Upon this profession of impartiality, the objection to his competency was overruled. *Goodwin* excepted.

If this ruling is to stand, it is feared that its operation, in connection with the settled policy of this Court not to disturb a verdict unless the insufficiency of the evidence appears beyond all doubt, will work great hardship, and often injustice. Both rules, it seems to us, ought not to be rigorously supported. To say that a jury who have formed and expressed their opinion, shall find a verdict which is not to be disturbed, unless it appear to the dim vision of the appellate Court to be palpably wrong, shows a defect somewhere. At least, it has little to commend it to public confidence. The reason given in *Mann* v. *Clifton*, 3 Blackf. 304, why a verdict should not be disturbed, seems conclusive in favor of that rule. The mischief must, therefore, be in the selection of the jury.

The purity and proximate correctness of judicial proceedings depend chiefly on the impartiality, or, as the books term it, the indifference, of those whose duty it is to find the facts. These once settled, there is seldom any doubt about the law. When the jury system is eulogized, it means, of course, a jury composed of men of fair, unprejudiced minds. It goes on the presumption that passion, ill-will, preconceived opinions, and every-

Nov. Term, 1853.

GOODWIN v. BLACHLEY.

thing unfavorable to a candid exercise of the judgment, is to be excluded from the jury-box. Impartiality can hardly be expected from the clearest intellect, if embarrassed in its action by an opinion both formed and expressed.

Some authorities say the test is, whether the opinion be fixed or trivial. But human ingenuity cannot devise means to measure the degree of tenacity in each case. Nor is the manner of forming the opinion, whether hasty or deliberate, by any means a sure test. The safe rule—that which will more certainly secure an impartial trial—is to regard those jurors only as competent who are altogether indifferent. From such a rule, in most of the counties containing from one to two thousand qualified jurors, with the supplemental aid of change of venue, &c., no practical inconvenience can ordinarily result. And if there should, the pure and impartial administration of justice is the great end to be attained, at whatever cost or inconvenience.

In the case at bar, the juror had both formed and expressed an opinion on the merits of the cause, and that, too, on information derived from the witnesses. Few minds could act under such impressions with entire fairness. However honest, the juror carried with him into the box a subtle and active element, not legitimately derived from the evidence. That the juror did not, after all, distrust himself, was the most cogent reason why the parties litigant should distrust him. Had he qualified his declared intention of being impartial with any doubt of his ability to be so, his intelligent candor might well have commended him to both parties as a safe juror; though it might not have restored his competency, if the objection was urged.

We, therefore, conclude, that when the juror has formed an opinion on the merits of the cause, on information derived from witnesses, he is disqualified.

This conclusion does not conflict with *McGregg* v. *The State*, 4 Blackf. 101, nor *Van Vacter* v. *McKillip*, 7 *id.* 578; though the reasoning in the one case may somewhat im-

pinge on that in the other. It is supported, to some extent, by the doctrine of the Court in the case of *Maize* v. *Sewell*, 4 Blackf. 447, and the authorities there cited. The case of *Irvine* v. *Kean*, has some similarity to the present case. A juror was challenged because it appeared he had heard the evidence and had formed and expressed his opinion. But he said his mind was always open to conviction on another state of facts. The Circuit Court permitted him to sit; but the Supreme Court reversed the judgment, holding that after the impression made on his mind by the evidence, there was danger of his being no longer impartial. 14 Serg. and Rawle 292. In the more recent case of the *People* v. *Bodine*, the whole subject of this species of challenge is elaborately reviewed, and it is laid down as the law, even in *England*, that the question for the triers is, whether the juror is, as he assuredly should be, altogether indifferent; and if they find he is not, they should reject him. 1 Denio 281. Reviewed and to this extent approved in the *People* v. *Honeyman*, 3 Denio 121. Following the lead of these authorities, we think the juror disqualified.

The second objection, that the verdict is contrary to evidence, seldom, we have seen, meets favor in the courts, if there is any evidence from which a jury might fairly infer the fact ascertained by their verdict. But a verdict which there is not sufficient evidence in the record to support, ought not to be sustained.

The general issue sworn to, threw on *Blachley & Co.* the proof of the execution of the note. The evidence showed that the name of *Wesley Goodwin*, as signed to the note, was in the hand-writing of *Richard Goodwin;* that *Wesley* could write, and, so far as disclosed, invariably signed his own name in his business transactions. But there is no evidence tending to show the authority of *Richard* to sign *Wesley's* name; except, perhaps, that *Wesley* was in company with the parties, and in the room where the note was signed; that he had been security on a former note, &c. But this is not sufficient, we think, in the absence of any evidence, that *Wesley* had

Nov. Term, 1853.

PHILBRICK v. FOSTER

authorized the signing, or recognized the act after it was done. *Modisett* v. *Lindley*, 2 Blackf. 119. Besides, it is in evidence that *Richard* was reckless in his business transactions, and that he had signed the name of *Shroyer* to the same note without authority. From all this, we think the presumption strongly against the authority of *Richard* to sign *Wesley's* name—no evidence from which a jury could fairly infer such authority. The motion for a new trial should have been sustained.

The third point, the instructions. We think those given embraced substantially those asked by the counsel for *Goodwin*.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden and *C. H. Test*, for the plaintiff.

J. S. Newman, for the defendants.

PHILBRICK *v.* FOSTER and Wife.

Action by husband and wife for an assault and battery upon the wife. Pleas—1. Not guilty; 2. *Son assault demesne*. Replication, *de injuria*. After the plaintiffs had given evidence tending to prove that the defendant had seized the wife and thrown her down while she was attempting to prevent him from beating her husband, they asked the witness whether the husband was a weak man and afflicted with disease. *Held*, that the evidence was admissible to show the manner and circumstances of the assault. *Held*, also, that an excess of force might be shown under the replication.

Friday, December 2.

APPEAL from the *Dearborn* Circuit Court.

DAVISON, J.—Trespass by *Foster* and wife against the appellant for an assault and battery on the wife. Pleas, 1. Not guilty. 2. *Son assault demesne*. Replication to the

second plea, *de injuria*. Verdict and judgment for the plaintiffs below.

The record shows that the appellees, after they had given evidence, on the trial, tending to prove that the appellant had seized *Foster's* wife, and threw her down, whilst she was attempting to prevent him from beating her husband, asked the witness, whether *Foster* was a weak man and afflicted with disease. The appellant objected to this question, on the score of irrelevancy. The objection was overruled, on the ground that the evidence was admissible in aggravation of damages. The witness then testified that *Foster* was a weak man, and, just before the transaction complained of, had been sick.

It is insisted, that, under the issues in the cause, it was not competent to show that the wife committed the assault charged in the second plea in defence of her husband. In the abstract, that position is correct. But it does not apply to the case before us. The evidence objected to did not set up a justification of the assault set forth in the plea, nor was it so intended. Its tendency was to illustrate the character of the transaction—to show the circumstances of the outrage, and the insulting conduct of the appellant. All this may be shown, to increase the damages. Mr. *Greenleaf* says, "The manner, motives and circumstances of the assault may be given in evidence." Thus, where the battery was committed in the house of the plaintiff, which the defendant rudely entered, knowing that the plaintiff's daughter-in-law was there sick, evidence of the fact was held admissible, without a particular averment. 2 Greenl. Ev. s. 89.—*Sampson* v. *Henry*, 11 Pick. 379. It appears to us that the evidence introduced by the appellees is within the rule just stated, and was, therefore, properly admitted.

At the instance of the appellees, the Court charged the jury—

1. If the defendant was in the act of committing a battery upon the husband, and the wife interfered in his defence, when the defendant turned upon her, took hold of her, threw her down and broke her arm, and he might

Nov. Term, 1853.

NASH v. HALL.

have protected himself from both *Foster* and wife without such act, the jury must find for the plaintiffs, on the ground that the defendant's battery was excessive.

2. If the force used in self-defence greatly exceed what is necessary for that purpose, the excess may be given in evidence under the common replication.

The appellant contends that these instructions are erroneous. We think differently. They admit that the wife was guilty of what, in point of law, amounted to the first assault; but, in effect, allege that the second plea, although technically true, was no justification for an excessive beating. The principle stated by the Court is unobjectionable. The force used must not exceed the necessity of the case. And the rule is well settled, that such excess may be shown under the replication *de injuria*. 2 Greenl. Ev. s. 95.—4 Blackf. 518.—6 *id.* 185.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. Ryman, for the appellant.

NASH and Others *v.* HALL and Others.

4 444
170 354

Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms.

Friday, December 2.

ERROR to the *Switzerland* Circuit Court.

DAVISON, J.—Bill in chancery by the defendants in error against *Isaac Nash*, *Cyrus Betts* and *Stephen Reed*, to recover a tract of land in *Switzerland* county.

The bill states that *Benjamin Hall*, on the 19th of *May*,

1830, purchased the land in dispute from one *Cornelius Culp*, from whom he received a deed. *Hall* died in possession of the land, leaving *Martha Hall*, his widow, and the following named children and heirs at law, viz., *George Hall*, *John Hall*, *Phebe Hall*, *Eleanor Hall*, (since married to *Jonas Miles*) *Elizabeth Hall*, (since married to *William C. Froman*) *James Hall*, *Peter Hall* and *Isaac Hall*. *Isaac Hall* has since died, leaving *Isaac M. Hall*, *Martha Hall* and *James Hall*, his heirs. The said widow and heirs, *Jonas Miles* and *William C. Froman*, were the complainants.

Stephen Reed, one of the plaintiffs in error, brought ejectment against these heirs for the recovery of said land, and at the *October* term, 1839, of the *Switzerland* Circuit Court, obtained a judgment. They were, however, entitled to the benefits of the occupying claimant law; and, upon their application, the land was valued at 762 dollars, and the improvements at 700 dollars. *Reed* elected to take the value of the land; whereupon, the Court adjudged that the occupants pay into the clerk's office of said Court, for the use of the successful claimant, 762 dollars, within ninety days from the 20th of *April*, 1840, provided the successful claimant should, within that period, tender into said office to said occupants a deed for the land. And if, on such tender being made within said period, they should fail to pay as aforesaid, the successful claimant should have his writ of possession, &c.

The bill charges that *Reed*, the successful claimant, did not, within the time specified, tender in said office a deed for the land, nor do any other act which required the complainants, who were the occupants, to pay the said 762 dollars; that one *Robert N. Cochran*, the agent of *Reed*, on the 13th of *August*, 1840, received said money of *Martha Hall*, the widow of the decedent, and, upon the margin of the record of said judgment, executed a receipt therefor. This receipt is set forth in the bill as follows: "Received of *Martha Hall*, by the hands of *Isaac Nash*, 762 dollars, and interest, being the amount of the subjoined judgment. *August* 13, 1840. [Signed] *Robert*

Nov. Term, 1853.

NASH v. HALL.

A. Cochran, agent for *Stephen Reed*." It is alleged that upon this payment, it became the duty of *Reed* to convey the land to the complainants; but, instead thereof, he, by his agent, conveyed it to *Nash*. The deed to *Nash* is dated *August* 13, 1840. In that year he got possession of the land. On the 17th of *July*, 1841, he conveyed it to *Cyrus Betts*, who is now in possession. *Nash* and *Betts* have received the rents, &c., which were worth 100 dollars a year. *Betts*, when he took his conveyance, had full knowledge of all the facts recited in the bill. The complainants tender back the said 762 dollars, with interest from the 13th of *August*, 1840.

The bill prays that *Nash* and *Betts*, or one of them, be compelled to receive the money, &c., and to convey the premises in question to said heirs, &c.; that an account be taken of all rents, &c., received by them; and for general relief, &c.

Reed, being a non-resident, was notified by publication, and, having failed to appear, was defaulted. *Nash* and *Betts* answered.

Nash, in his answer, avers that *Reed* executed a deed to said occupants, and, within the period specified in the judgment, deposited it for them in the said clerk's office. He alleges that they never paid the 762 dollars; that while said deed was in the clerk's office, and the time designated for the payment of that sum had expired, it was agreed between him and the said *Martha Hall*, that he should purchase the land and take a deed for it in his own right, and if she would, by the 1st of *March*, 1841, pay him 900 dollars, with 10 per centum interest from the 13th of *August*, 1840, he was to re-sell and convey the land to her. Pursuant to this agreement, *Nash* bought the land of *Reed's* agent, paid him the 762 dollars, and in addition paid her 200 dollars. He also gave her a bond, obligating himself to make her a deed for the land upon payment of the money advanced by him, with interest as aforesaid, by the said 1st of *March*, 1841. The bond is set out in his answer, and bears date *August* 13, 1840. In *April*, 1841, *Martha Hall* called on *Nash*, and informed

him that she could not comply with her contract—that she would abandon it. He then proposed to give her 50 dollars, if she would abandon her contract and give up possession of the premises. She accepted the proposition; the 50 dollars was paid; she removed from the land, and he took possession of it.

The answer sets up, that the entire consideration given by *Benjamin Hall* to *Culp* for the land in controversy, was the conveyance of a tract of land in *Ohio* county. At the time this tract was conveyed to *Culp*, it was worth only 200 dollars; while in his possession, he made improvements on it of the value of 200 dollars. After said recovery in ejectment, *Culp* re-conveyed said tract to the complainants; and, besides, paid said *Martha Hall* 200 dollars. This re-conveyance and payment were made in satisfaction of the claim of said heirs for improvements on the land set forth in the bill. In the year 1842, the said *Martha* took possession of the land re-conveyed by *Culp*. She has occupied it ever since, and herself and said heirs have received the rents, &c.

The answer of *Betts* alleges, that he is not advised as to whether the charges in the bill are true or false. He cannot, therefore, admit or deny them. When *Nash* purchased the land, he, *Betts*, was a minor. *Nash* was his guardian. The land was bought for him, *Betts*, and partly with his money. He had nothing to do with the transaction. He admits the conveyance to him from *Nash;* states that he has made improvements on the land worth 700 dollars; that the land thus improved is worth 100 dollars a year. He denies all fraud, &c.

The cause was submitted on bill, answers, exhibits and depositions. The Court decreed that the complainants had the right, and were thereby permitted, to redeem the premises, on payment of 1,223 dollars, that being the principal sum, with interest from the 20th of *April*, 1840, which, by the judgment of said Court, they were required to pay the said *Stephen Reed;* that said sum be paid to the clerk of the Court, within thirty days, for the use of said *Betts;* that on payment of said sum of money, within said time,

Nov. Term, 1853.

NASH v. HALL.

and notice thereof to said *Betts*, he was required to quit-claim all his title, &c., to said land to the complainants; that the money, &c., paid to *Martha Hall* by *Nash*, and the improvements made by him and *Betts*, stand and be set off against the rents, &c., while the premises were in their possession, &c.

In support of this decree, it is contended that the tender of a deed to the occupants, within the period specified, was a condition precedent; that this condition never was complied with, and that hence they were not, within that period, bound to pay or tender said 762 dollars, and they still have a right to tender the money and claim the land.

It must be conceded that the money was not, within said time, paid or tendered. And the inquiry arises, Did the successful claimant tender a deed pursuant to said judgment? If this was done, he had a perfect right to sell and convey the premises.

The bill charges that *Reed*, the successful claimant, never made or tendered a deed to the occupants. But *Nash*, in his answer, avers, that such deed was executed and deposited in the clerk's office, &c. Relative to the issue thus made, the depositions furnish no proof. It, therefore, becomes necessary to inquire, whether the answer, in that respect, was evidence in the cause.

"The general rule is, that an answer directly responsive to the bill must be taken as true, unless disproved by two witnesses, or by one witness and corroborating circumstances." 2 Blackf. 324. But the complainants insist, that "the fact of tender is set up by *Nash* as a defence, and should be proved by him; that, if it be a fact, it is within the knowledge of the defendants, and should be proved by them. It is not possible that the complainants can prove that the deed was not tendered." If the averment in the answer had been matter in avoidance merely, these positions would have been correct; but it is a direct response to a material charge in the bill. 2 Blackf. 324. The defendant was compelled to answer the charge. Had the averment amounted to an admission of the tender, it would have settled the case against him. As it

stands, it would seem that he was entitled to the benefit of it. The tender being within the defendant's knowledge, affords no reason why his answer should not be taken as true. The complainants have, in effect, made him their witness, and called on him to answer truly. This he was bound to do; and, because he knew the fact, might give his response additional weight. It is true, the burden of proof is generally on the party holding the affirmative. To this rule there are exceptions; and we think the case before us is one of them. Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms. 1 Greenl. Ev., s. 78.

In this case, if the deed in question was tendered within the time prescribed, the complainants have no right to redeem. Without the charge that it was not tendered, their bill would have been substantially defective. It follows that that charge was "an essential element in the case," and it was incumbent on them to prove it.

To sustain their bill, the complainants introduced the deposition of *Jones*, the clerk of the *Switzerland* Circuit Court. He deposes merely that he had searched his office and found no deed from *Stephen Reed* to the heirs of said *Hall*. This evidence is insufficient to establish even a presumption against the answer of *Nash*. *Jones* was not clerk at the time the deed is alleged to have been in the clerk's office. It was not requisite that *Reed* should suffer it to remain there after the ninety days had expired. There is nothing in the circumstance that it was not in the office when *Jones* made the search. Therefore, it seems to us, that the answer of *Nash* is proof that a deed was tendered to the heirs of *Hall*, in accordance with the requisitions of said judgment.

This view, in our opinion, decides the case against the complainants. The contract between *Nash* and *Martha Hall* took place after the occupants had forfeited their claim to the premises. Under that contract, *Nash* ad-

Nov. Term, 1853.

PHELPS v. YOUNGER.

vanced 762 dollars to *Reed's* agent, received a deed for the land, advanced *Martha Hall* 200 dollars, and gave her a bond obligating himself to make her a deed, on the payment of 900 dollars, with 10 per cent. interest. She failed to pay the money. The parties rescinded the contract, and *Nash* got possession of the land. The record presents nothing against the validity of these transactions. Nor does it appear that *Hall's* heirs had any interest in them, either in law or equity.

Per Curiam.—The decree is reversed with costs, and the proceedings subsequent to the answers set aside. Cause remanded, &c.

J. G. Marshall and *D. Kelso*, for the plaintiffs.

J. Sullivan, for the defendants.

PHELPS *v.* YOUNGER, Administrator.

A. and *B.* having mutual accounts between them, *B.* died, and *C.* was appointed his administrator. *C.*, afterwards, as administrator, executed to *A.* a note payable out of *B.'s* estate. *Held*, that the note was *prima facie* evidence of a settlement of the mutual accounts, and of the amount found due on the settlement.

To impeach a note founded upon the settlement of mutual accounts, it is necessary to show some mistake or fraud in the settlement.

Saturday, December 3.

ERROR to the *Lawrence* Circuit Court.

ROACHE, J.—*Phelps* sued *Younger*, as administrator *de bonis non* of *Robert Woody*, deceased, before a justice, and recovered a judgment. The following was the cause of action filed:

"Due *Alpheus Phelps*, from the estate of *Robert Woody*,

deceased, seventy-nine dollars and eighty-eight cents. *June* 23, 1843. *L. Woody*, Administrator of estate of *R. Woody*."

In the Circuit Court, the defendant filed several pleas, and gave notice of set-off. There was a trial by the Court, and judgment for the defendant. The evidence is set out in a bill of exceptions.

The testimony shows, that for some time previous to the death of *Robert Woody*, there was a mutual dealing between him and the plaintiff, which it does not appear was settled prior to the decease of the said *Robert*. It was also proved, that at the sale of the decedent's effects, the plaintiff became a purchaser, but to what amount was not precisely fixed by the evidence, but exceeding 100 dollars. On the same day of the sale, the plaintiff gave the administrator a receipt, in general terms, for 117 dollars and 18 cents, and that was most probably what his purchases amounted to. The exact sum, however, is not material in the view we take of the case. This was the last item of account proved. The note on which suit is brought was executed ten months afterwards. There was no evidence showing that the note was given for any specific indebtedness.

It was *prima facie* evidence of a settlement of the mutual account up to its date, and that the amount specified in it was found due on such settlement.

Proof of a running, unliquidated account, consisting of a variety of items, all anterior to the date of the note, does not tend to show that the note was erroneously given, or that it had been paid; but rather tends to support it as showing the consideration on which it was founded—a balance found due on the adjustment of the unliquidated account.

To impeach a note founded on such a consideration, it is necessary to show some mistake or fraud in the settlement. As there was no evidence of either in this case, the finding and judgment of the Court below were erroneous.

Nov. Term, 1853.

ABBOTT v. SMITH.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. G. Dunn, for the plaintiff.

J. S. Watts, for the defendant.

ABBOTT and Others *v.* SMITH.

If an attorney at law, to whom a claim has been sent for collection, employs another to collect it, without authority from the client, he will be liable for any damage to the client arising from the negligence or want of skill of such other attorney.

The damages arising from such negligence or unskillfulness are of an unliquidated character, and not, under the R. S. 1843, a subject of set-off.

Saturday, December 3.

ERROR to the *Dearborn* Circuit Court.

ROACHE, J.—Foreign attachment by *Smith* against the plaintiffs in error. Property of the plaintiffs, who were non-residents, was regularly attached. A declaration was filed, containing a count on an account stated, and the money counts. The defendants below appeared and plead the general issue, and notice of set-off. By agreement of parties, the case was tried by the Court, which found for the plaintiff, and rendered a judgment for 1,537 dollars and 89 cents.

In support of his declaration, *Smith* introduced an account stated by *Abbott* and *Brothers*, under date of *June* 30, 1844, exhibiting a series of transactions between the parties, and showing a balance due the former, at that date, of 1,114 dollars and 42 cents.

The defendants proved that in 1840, they placed in the hands of *Smith*, who resided at *Louisville*, *Kentucky*, four notes on *Branham* and *Todd*, amounting, with their interest, to 2,629 dollars and 38 cents, for collection by him as an attorney. The latter immediately forwarded the

notes to *Marshall* and *Cushing*, attorneys resident at *Madison, Indiana*, in the vicinity of which place *Branham* and *Todd* were doing business.

In *March*, 1842, *Marshall* and *Cushing* obtained a judgment on three of the notes for 1,377 dollars and 93 cents.

On the third of *October*, 1843, *Cushing* received from *Branham* and *Todd* railroad scrip, treasury warrants, and some real estate, for which he gave them up the fourth note, which had not been included in the judgment, and entered a credit for the balance on the judgment, for 1,012 dollars and 19 cents. The receipt was signed by *Cushing*, as attorney of *Abbott* and *Brothers*.

Up to this period, it does not appear that *Abbott* and *Brothers* were apprised of the employment of *Marshall* and *Cushing*. Shortly afterwards, in a correspondence between them and *Smith*, they expressed dissatisfaction with the management of the business, and in *February*, 1845, took it out of the hands of *Marshall* and *Cushing*, and transferred it to *Bright* and *Dunn*. The latter got a portion, but not all of the property taken by *Cushing* on the judgment against *Branham* and *Todd*. A portion of the real estate was sold and the proceeds accounted for, and another portion conveyed to *Abbott* and *Brothers*, who still own it. No attempt is shown to have been made by the plaintiffs in error to avoid the settlement or compromise, but all their efforts, up to 1846, seem to have been directed towards making the most out of the property taken on the compromise; and their changes of attorneys had that object merely in view.

In 1846, *Abbott* and *Brothers* directed *Stevens*, their attorney and agent, to take charge of the business and close it up. *Bright* and *Dunn* accounted to the latter for what had come to their hands.

Stevens, according to their directions, called on *Smith*, and demanded of him the *Branham* and *Todd* notes, or the money, if collected. *Smith* gave him 240 dollars in small notes, which he had received through *Cushing* on the *Branham* and *Todd* notes, and, being all that had ever come into his hands, denied any further liability.

Nov. Term, 1853.

COOLEY v. HARPER.

On this state of facts, the Court found for *Smith* for the amount of the account stated, with interest, and disallowed the claim set up as a set-off.

No question is raised as to the correctness of the claim of *Smith*; but the whole controversy arises as to the demand attempted to be sustained by *Abbott* and *Brothers* as a set-off.

It was the duty of *Smith*, on receiving the *Branham* and *Todd* notes, to use diligence and skill in their collection. If he employed other attorneys under him, without authority from his clients, he was responsible for their acts. If through deficiency of skill or diligence either of himself or of the attorneys employed by him, his client should suffer, he would be liable to an action. In such case the claim would not partake of the nature of a debt; but would be a claim for damages for professional incapacity or negligence; it would be an action sounding in unliquidated damages, which could only be ascertained by the finding of a jury. Such a claim is not a proper subject of set-off. See R. S. 1843, p. 708, s. 204.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

S. C. Stevens, for the plaintiff.

J. Sullivan, for the defendant.

COOLEY *v.* HARPER.

If a sheriff, having levied upon personal property, leaves it in the hands of the execution-defendant for safe keeping, and the latter loses it, or converts it to his own use, such loss or conversion is a sufficient disposition of the levy to authorize the issuing of another execution.

A party who would rescind a contract on the ground of fraud, must return whatever of value he has received upon the contract from the opposite party, that they may be placed *in statu quo*.

ERROR to the *Delaware* Circuit Court.

Perkins, J.—The proceedings in this case were commenced by a notice of a motion to set aside executions issued upon two judgments rendered in the *Delaware* Circuit Court at the *September* term, 1840, in favor of *Harper* against *Cooley*, it being alleged that said judgments had been satisfied by a release under seal, of which profert was made.

Afterwards, at the *September* term, 1847, the plaintiff filed an amended notice, as a second count, alleging, as a further cause for setting aside said executions, that in *October*, 1841, an execution issued on each of said judgments, by virtue of which the sheriff levied on certain personal property sufficient to satisfy said judgments, and that said levies remained undisposed of, the sheriff having made returns that the property levied on was not sold for want of bidders.

The defendant pleaded that the release above mentioned was obtained by fraud. The plaintiff replied that it was not. Issue.

The defendant also filed three pleas to the second count.

1. That said executions were not issued and levied, &c.; and upon this there was issue.

The 2d and 3d pleas alleged that the property so levied on was left by the sheriff in the possession of *Cooley*, the execution-defendant; that the sheriff took no delivery bond; that said *Cooley* had converted the property to his own use; and that none of it had been applied to the satisfaction of the judgments.

The plaintiff demurred to the two last-mentioned pleas, but the demurrers were overruled, and judgment rendered on the demurrers as to the second count.

The cause was submitted to the Court upon the issue joined upon the plea of fraud to the first count. The Court found for the defendant, and overruled the plaintiff's motion to set aside the executions.

The counsel for the plaintiff contends that the Court

Nov. Term, 1853.

COOLEY v. HARPER.

erred in overruling the demurrer to the second and third pleas to the second count.

When property is levied on by virtue of an execution, if it remains unsold during the lifetime of the execution, the proper course for the plaintiff to pursue, is, no doubt, to procure the issue of a writ of *venditioni exponas*. The levy operates as a satisfaction of the judgment to the extent of the value of the property taken, until it is in some way disposed of. It is also the duty of the sheriff to keep the property safely, and, if he fails to do so, and the property is lost, the execution-plaintiff may have an action against him. But he may make the execution-defendant, or any other person, his agent to keep the property, of course at his own risk so far as regards the claim of the execution-plaintiff, and if the property should be lost through the fault of the execution-defendant, or if it should be converted by him to his own use, we do not perceive any good reason why either should not be regarded as a sufficient disposition of the levy to authorize the issue of another execution, if the plaintiff should be disposed to pursue that course, rather than his remedy against the sheriff. Surely, the execution-defendant, who had converted the property levied on, could not complain of this, and to decide otherwise would only have the effect of producing circuity of actions to obtain the rights respectively of the parties; for, if the sheriff should be required to satisfy the execution-plaintiff, the execution-defendant would, in turn, be answerable to the sheriff. We think, therefore, the demurrers were properly overruled.

The counsel for the plaintiff also contends that the finding of the Court upon the issue of fact was not warranted by the evidence. There was some evidence tending to prove that the release was fraudulently obtained; and as it was a question for the jury, or the Court sitting as such, we do not think the judgment ought to be reversed on this ground.

It must, however, be reversed. The evidence shows that the execution-plaintiff received 150 dollars in cash,

and *Cooley's* note, with one *Clark*, as surety, for 125 dollars, in consideration of the release. These he retains, and has made no offer to return them, or either of them. It is well settled that if a party would rescind a contract on the ground of fraud, he must return what of value he has received upon said contract from the opposite party, that they may be placed in *statu quo*. *Hardesty* v. *Smith*, 3 Ind. R. 39.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

T. J. Sample, *O. H. Smith*, and *S. Yandes*, for the defendant.

VERDEN *v.* COLEMAN and Others.

By an Indian treaty made in 1832, the *United States* agreed to grant to one *T.*, an Indian, a section of land, which should be conveyed to him by patent. The land was to be selected under the direction of the President. The agent appointed by the President reported, on the 20th of *January*, 1836, that he had selected the section, a part of which was the land in question, and the President approved the report, but no patent ever issued to *T.* One *H.* had, in 1832, located on the land in question, made improvements and continued to occupy it, and, in 1841, obtained a patent for the same under a pre-emption right. *Held*, that the treaty did not operate as a grant *in præsenti*, but only as a contract for a future conveyance by patent. *Held*, also, that *H.'s* title was complete.

APPEAL from the *Benton* Circuit Court.

Saturday, December 3.

PERKINS, J.—Bill in chancery to obtain an injunction restraining the sale of land under a power to sell contained in a mortgage. A temporary injunction was granted, which was dissolved on the coming in of the answer. Appeal to this Court.

Nov. Term, 1853.

VERDEN v. COLEMAN.

There is no dispute about the facts in the case, and they may be briefly stated as follows:

In *April*, 1850, the plaintiff, *Verden*, executed to *Isaac Coleman* a mortgage on certain lands lying in *Benton* county, *Indiana*, to secure the payment of a sum of money in one year from that date. The mortgage gave to *Coleman* the power to proceed by notice, &c., and sell the property mortgaged to make the money, if it should not be paid when due, without a resort to judicial proceedings. The money was not paid when due, nor at all, and *Coleman* proceeded, all regularly, to advertise, preparatory to a sale upon a day specified. Before that day arrived, this bill was filed, praying an injunction upon the sale, and, as a reason therefor, the plaintiff said that he purchased the lands mortgaged of *Coleman*; that the mortgage was given to secure the balance of unpaid purchase-money; that to a part of the land sold to said plaintiff, and by him re-conveyed to *Coleman* by mortgage, *Coleman* had no title, and that said plaintiff had paid as much of the purchase-money on the whole tract as the part of it to which *Coleman* had title was worth. As evidence upon which he relies to show that *Coleman* had no title to a part of the land in question, the plaintiff sets forth that on the 27th of *October*, 1832, a treaty, subsequently ratified by the President and Senate, was made between *Jonathan Jennings*, *John W. Davis* and *Marks Crume*, commissioners on the part of the *United States*, and the chiefs and warriors of the *Potawatamie* Indians, which treaty, by article 3, declared that—"The *United States* agree to grant to each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent." Among others, "to *To-pen-ne-bee*, principal chief, one section." "The foregoing reservations shall be selected under the direction of the President of the *United States*, after the lands shall have been surveyed, the boundaries to correspond with the public surveys."

The plaintiff showed further, that under this treaty, the President appointed *J. T. Douglass* to select the lands

who, on the 20th of *January*, 1836, reported that he had selected for *To-pen-ne-bee* a certain section which covers a part of that embraced in the mortgage, and which report was approved by the President. No patent, however, ever issued conveying the section to *To-pen-ne-bee;* but, upon the 10th of *August*, 1843, a patent for it issued to *Hananiah Hewitt*, through whom *Coleman* claimed title, said patent reciting that *Hewitt* had "deposited in the general land-office of the *United States* a certificate of the register of the land-office at *Crawfordsville*, whereby it appeared that full payment had been made" by said *Hewitt* for the land, according to the act of congress, &c.

It appears that *Hewitt* claimed and obtained the title to the land under a pre-emption right; that he settled on it early in 1832, made improvements, continued to occupy, tendered the money for the land at the land-office, &c.; and that *Douglass* selected said tract in violation of the instructions under which he acted, as they directed him not to select land thus claimed; and that the war department at *Washington*, after the selection had been inadvertently approved by the President, upon learning the facts of the case, ordered the selection to be set aside.

In considering this case, we shall pass by the question of the right of the mortgagor to dispute the title to land he has mortgaged; and also the question as to the power of any department of the government, other than the judiciary, to set aside a grant of land, as, it is alleged, was attempted to be done in reference to the section selected for *To-pen-ne-bee;* and shall inquire what grant has been made in the case—who, according to the showing in the record, now has the legal title to the land in dispute.

A grant by patent, in the usual form, has been made by the proper authority to *Hewitt*. Of this there is no doubt. But it is insisted that a prior grant, of the same land, had been made to *To-pen-ne-bee*, whereby that to *Hewitt* was rendered unavailing. It is contended by the counsel for the plaintiff, that the clauses we have quoted above from the treaty of 1832, (for they are all that bear

Nov. Term, 1853.

VERDEN v. COLEMAN.

upon the question) operated as a grant, and vested the legal title in fee simple to the land, in *To-pen-ne-bee*, the moment the selection was made and approved under it. If they did not so operate, then it was clear that the Indian had no interest in the land, and the title of *Hewitt* was complete, as the equity of the case was manifestly all with him, as well as the legal title, upon the issue of his patent.

In *Wilcox* v. *Jackson*, 13 Peters (U. S.) R. 498, it is said that "with the exception of a few cases, nothing but a patent passes a perfect and consummate title" to any part of the public lands. One class of cases to be excepted, is, where an act of congress grants land, as is sometimes done, in words of present grant. And, we may add, where the act or treaty provides for no other mode of conveyance, the courts incline, by construction, to make the terms of the one or the other, as the case may be, operate as grants, where the language taken altogether, in connection with what may be supposed to have been the intention, will admit of it. But in the case before us, it would be straining very much the doctrine of construction, to convert the language of the treaty into words of present grant; and it would be doing it in a case where no necessity existed for it, and where injustice would be promoted by it. Here, the treaty provided expressly the mode in which the legal title was to be conveyed, viz., "by patent;" which was superflous, if it was supposed it was already conveyed without a patent.

In *Longlois* v. *Coffin*, 1 Ind. R. 446, this Court had precisely the same question before it as is now under consideration, and the decision was, that "where a treaty says that the title to a certain tract of land is thereby vested in a certain individual, his heirs and assigns, the treaty operates as a grant of the land. But where it says, as in the present case, that a half section of land, at a specified point, shall be granted to a certain person, his heirs and assigns, by a patent from the President of the *United States*, the clause amounts only to a contract that the land shall be afterwards properly located by an agent of

the government, and be conveyed by a patent from the President."

Nov. Term, 1853.

STACKBERGER v. MOSTELLER.

Per Curiam.—The decree dissolving the temporary injunction is affirmed, with costs.

H. S. Lane, S. C. Willson, D. Mace and *W. C. Wilson*, for the appellant.

Z. Baird and *J. M. Reynolds*, for the appellees.

STACKBERGER *v.* MOSTELLER.

An agreement to lease land for the term of two years, at a rent equal to the full rental value of the premises, the occupation to commence at a future day, is an agreement relating to an interest in land, and under s. 16, c. 28, R. S. 1843, and notwithstanding the exception in that section relating to leases not exceeding the term of three years, to be valid, it must be in writing.

A suit will not lie upon an oral agreement for such a lease on account of the refusal of the lessee to deliver possession of the premises at the time appointed.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Saturday, December 3.

STUART, J.—Assumpsit on a verbal agreement in relation to a lease of lands. There are several counts, the substance of which is, that in *January*, 1850, the defendant, *Mostéller*, had "agreed, rented and to farm let" to the plaintiff, a certain farm, dwelling-house and outhouses situate thereon, in, &c., for the term of one year from *March*, 1850; that the farm had a hundred acres of tillable land, suitable for corn, grain, &c., which, at the instance of the defendant, the plaintiff was to cultivate, rendering as rent therefor, one-third of the corn, &c., raised thereon—averring the rent thus reserved to be a full compensation

Nov. Term, 1853.

STACKBERGER v. MOSTELLER.

for the use of the premises. The plaintiff further avers that he was at great expense in preparing to enter on the land. He also avers that on the 1st day of *March*, 1850, he was ready and willing, on his part, to enter, &c.; that he demanded of the defendant the possession, which the latter wholly failed and refused to give; whereby the plaintiff lost the profits of the land, &c. Damages, 500 dollars. Trial by the Court on the general issue, and finding for the defendant. The plaintiff appealed.

A bill of exceptions, taken during the progress of the trial, discloses the only point in controversy.

The plaintiff admitted the leasing to be by verbal contract; and that such contract was the only one on which he had any evidence to offer. The defendant admitted that he had contracted verbally as alleged in the first count. Two witnesses were offered by the plaintiff to prove the damages he had sustained by reason of the breach, &c., but, the defendant objecting, the objection was sustained, for the reason that the Court was of opinion no action could be maintained on such verbal contract.

The one party relies on the 16th sec. c. 28, R. S. 1843, and the other on the clause in the same section excepting leases not exceeding three years. What constitutes the 16th section in our statute of frauds, is divided into two sections in the *English* statute—the exception forming a second and distinct section. The clause referred to reads, "except," &c., "all leases not exceeding the term of three years from the making thereof, upon which the rent reserved shall amount to at least one-half of what the rent thereof is really worth." The *English* statute requires the "rent reserved to be two-third parts, at the least, of the full improved value of the thing demised." In other respects, ours is a substantial copy.

We are referred to *Inman* v. *Stamp*, 1 Starkie R. 12, as a leading authority in point. That was an action of assumpsit for not occupying the plaintiff's premises according to contract. It appeared that the defendant had agreed verbally to take the plaintiff's apartments from

the next ensuing Christmas, for a term not exceeding three years, at a stipulated rent payable quarterly. Relying on this verbal contract, the plaintiff took down from his window the advertisement of "lodgings to let." The day before Christmas the defendant notified the plaintiff of his intention to abandon the agreement. *Ellenborough*, C. J., held that this was a contract for an interest in lands, within the meaning of the statute of frauds, and was, therefore, void. But it was also intimated that had the defendant entered into possession of the premises, it would have been otherwise; for such entry would have been part execution of the contract.

Only change the position of the parties, and the case of *Inman* v. *Stamp* is the case at bar. There the lessor sued the lessee for refusing to take possession according to contract. Here the lessee sues the lessor for refusing to deliver possession. If the former is void as against the policy of the statute of frauds, it would be difficult to find any good reason for sustaining the latter. The authority seems conclusive against the plaintiff unless the case in *Starkie* has been overruled; and we cannot find that it has been. On the contrary, we find it recognized by *Bailey*, J., as a leading authority—saying that, unless *Inman* v. *Stamp* could be successfully impeached, it must govern the case then under consideration. *Edge* v. *Strafford*, 1 C. & J. 391.

Per Curiam.—The judgment is affirmed with costs.

D. Mace and *W. C. Wilson*, for the appellant.

Z. Baird and *R. C. Gregory*, for the appellee.

Nov. Term, 1853.

DEVELIN v. RIGGSBEE.

DEVELIN *v.* RIGGSBEE.

The release of a parol contract need not be under seal.

The term "marriage contract" is applied to the public ceremony of marriage and to the prior contract to marry which that ceremony implies.

A female at the age of eighteen years is, in this state, as to the power to enter into a marriage contract, an adult.

A female over eighteen and under twenty-one years of age, may, in this state, make a valid release of a contract to marry.

Saturday, December 3.

ERROR to the *Franklin* Circuit Court.

STUART, J.—*Lydia Riggsbee*, by her next friend, sued *Develin* for breach of marriage contract. The declaration contains three counts: 1. A promise to marry when requested, and refusal. 2. A promise to marry on request, but that he married another. And, 3. To marry in a reasonable time, and refusal.

Develin filed four pleas. First, the general issue, which was afterwards withdrawn. The second and fourth pleas set up a release from Miss *Riggsbee* before suit, and after she had arrived at the age of eighteen years. The demurrers filed to these pleas were sustained. The third is the only plea leading to an issue of fact. This plea is similar to the second and fourth, with the additional allegation that the release was made with the consent of her father and next friend.

Trial by jury. Verdict and judgment for the defendant in error for 750 dollars.

The first question is on the validity of the second and fourth pleas.

The demurrers were special, assigning for cause that the pleas set up a release as a bar to the action, without making profert of it. If a release always imports a seal, then the special demurrer was well taken. 1 Chitty Pl. 366.—1 Saund. R. 9, note d. The usual understanding of the word release is, that it is under seal; yet, in some cases, a discharge or release is as valid without a seal as with it. 1 Serg. and Rawle 312.—*Delacroix* v. *Bulkley*, 13 Wend.

71.—*Dearborn* v. *Cross*, 7 Cowen 48.—*Lattimore* v. *Harsen*, 14 Johns. R. 330.—1 Cowen 122.—9 *id.* 46. There is some reason for a seal when it is intended to operate as a release of a deed or other sealed instrument; for then the releasing instrument should be of equal dignity with that released. But the reason ceases as to parol contracts. A verbal release is of equal dignity with a verbal promise, and should be regarded as of equal force and validity.

Such is the case at bar. Neither of the pleas demurred to, as we understand them, allege a release under seal, in terms. The second plea calls it her certain release in writing.

The fourth plea does not allege it to be in writing even. It simply avers, that, in consideration of the notes, she did then and there release and discharge, &c. There is nothing, therefore, in the pleas to which the demurrer for want of profert was applicable. For from the wording of the pleas and the nature of the promise alleged to be released, it is not to be presumed that the release was under seal. The special demurrer to the second and fourth pleas was, therefore, not well taken, and should have been overruled.

But as these demurrers had also the effect of a general demurrer, if the matter pleaded were insufficient to bar the action, the ruling of the Court was not erroneous. The defence set up in these pleas resolves itself into a single question: Can a female, over the age of eighteen and under twenty-one years, for a valuable consideration, viz., 200 dollars, make a valid release of a marriage contract? If she can, then the pleas are a bar to the action brought by her on such contract.

The general current of authorities is, that the acts of an infant are voidable only. A warrant of attorney to confess judgment is an exception—that is void. 6 Cowen 393. There are other exceptions not necessary to be noticed. Nor, admitting the release in question to be voidable, will we stop to inquire when it was competent for Miss *Riggsbee* to avoid it. In *Roof* v. *Stafford*, the Court

Nov. Term, 1853.

DEVELIN v. RIGGSBEE.

lay down the rule, that the the time of avoiding the executed contracts of an infant is when he comes of age. 7 Cowen 179. And the decision, to that extent, is not disturbed in the Court of errors. 9 Cowen 627. Perhaps, therefore, the disaffirmance, by bringing the suit while she was yet a minor, was premature; but of this we give no opinion.

The Courts, in their anxiety to adhere rigidly to the rules in favor of infancy, should not be blind to the subject-matter of the suit. It is not to be denied that a young lady of the ripe age of eighteen or upwards, does not, in point of fact, need the aid of the courts to enable her to make and unmake marriage contracts. Infancy, on such a subject, is in name only, and not in reality. The courts may well be excused from over-nice distinctions in favor of mere nominal infancy.

So it seems to be regarded by the revised statutes of 1843. Thus, section ten of the marriage act reads—

"If either of the persons intending to marry is a male under the age of twenty-one years, or a female under the age of eighteen years, and shall not have had a former wife or husband, the clerk shall not issue a license to such person without the consent of the parent or guardian having the custody of such minor, if there be any in this state competent to act."

The twelfth section speaks of the lawful age to marry without the consent of the parent or guardian, and provides substantially that the license may issue after the above ages without such consent.

It is not necessary to notice the meaning to be attached to "marriage contract." These terms are applied both to the public ceremony of marriage, and to the prior contract to marry which that ceremony implies. Hence, the suit here brought is for breach of marriage contract.

The policy of the law in the protection of infants is wise and humane, and should be enforced. But it seems, from the foregoing sections, that the legislature justly concluded that as to the marriage contract, the rigor of the rule might be somewhat relaxed in favor of the fe-

male. Accordingly a discrimination of three years is made. The female at eighteen is deemed as competent to judge for herself in contracting matrimony, as the male at the age of twenty-one. At these ages, and for that purpose, the statute puts them upon an equality: they may both contract marriage without consent of parents or guardians. As to that contract, the female at eighteen is, therefore, in this state, an adult. This view is further corroborated by the act in relation to apprentices, where the same discrimination is observed. R. S. 1843, p. 615. The male is to be bound till he is twenty-one and the female till she is eighteen years of age.

In *England*, it seems that the full age of male and female is twenty-one years. At this age the female may dispose of herself. 1 Black. Comm. 463. But this, says the commentator, is merely arbitrary, and fixed at different times in different countries. Thus, in *Naples*, the female is at full age at eighteen. *Id.* 464. We cannot find that the *English* statutes have changed the law in this respect since the time of *Blackstone*. So that no light is to be gleaned from that quarter. Nor have we been able to find any *American* case in point. We therefore place the decision upon the obvious policy flowing from a fair construction of our own statute.

If, at the age of eighteen, the female be an adult as to the marriage contract, it necessarily follows that she is competent to release such contract. Had the statute proceeded a step further, and declared that at the age of eighteen she might contract in relation to personal property, her power to buy, sell, receipt for, release, and do every thing incident to such contracts, could not be seriously doubted. Suppose, under such statute, she accordingly sell her gold watch on credit, her power to receive the price, and receipt to or release the purchaser, is necessarily implied in the power to sell. So with the marriage contract. We can see no good reason to distinguish the one case from the other. The power to contract being conferred, the incidents properly belonging to it follow.

We, therefore, conclude that a release of *Develin*, after

Nov. Term, 1853.

WEED v. EDMONDS.

Miss *Riggsbee* had attained the age of eighteen years, was a good bar to an action on a verbal promise of marriage. We thus confine it strictly to the case at bar.

Should the statute so expounded be found to operate injuriously, the legislature have only to impose such further restrictions as in their wisdom may be deemed expedient.

This view of the case renders it unnecessary to notice the instructions given and refused. It also leaves the settlement between the parties in full force—Miss *Riggsbee* being entitled to the notes given her by *Develin* in that settlement.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. W. Parker and *J. B. Sleith*, for the plaintiff.

J. Ryman, for the defendant.

WEED and Others *v.* EDMONDS.

4 468
149 414

The petition of an administrator to sell lands for the payment of debts, described the land as follows: "South-east quarter of sect. 19, T. 12: 9," and did not state the county or state in which the land was situate. *Held*, that the description was insufficient.

A petition of this kind was required, by the R. S. 1843, to be verified by the oath of the administrator.

A party by contesting such a petition will be presumed to have waived such verification, but he will not if he did not appear.

The rule in equity that the case made must be consistent with the bill, applies also to such a proceeding.

Saturday, December 3.

ERROR to the *Vigo* Probate Court.

DAVISON, J.—*Samuel W. Edmonds*, administrator of the estate of *Cyrenus W. Chapin*, deceased, filed a petition

alleging that no personal assets belonged to said estate, but that *Chapin* died seized of certain land, viz., "The south-east quarter of sect. 19, T. 12: 9," worth 1,000 dollars. That *Elisha Parson et al.*, at the *May* term, 1824, recovered a judgment in the *Vigo* Circuit Court against the said *Chapin* for 3,061 dollars, &c., which is unpaid, and has been duly presented to the administrator for payment. That *Chapin*, at his death, left the following named heirs, viz., *Thaddeus Weed*, *Louisa Weed*, *James Weed*, *Amelia Weed*, *Charles Pickering* and *Catharine Pickering*, who are non-residents. That *Thomas* and *William McQuilkin* pretend to have some claim to or interest in the land. The prayer is, that the said heirs, and also the *McQuilkins*, be made defendants, &c.; and that they be notified, &c., to show cause why said real estate may not be made assets, &c. The petition was not verified by oath or affirmation.

The heirs being non-residents, were notified by publication, and having failed to appear, were defaulted. The *McQuilkins* answered. Their answer sets up that the east half of said land was, in the year 1824, sold for taxes; that one *Samuel McQuilkin*, the father of the respondents, at his death held the same by title derived from that sale. They claim from him by descent. In the lifetime of *Samuel McQuilkin*, *Thaddeus Weed et al.*, heirs at law of said *Chapin*, brought ejectment against him in the *Vigo* Circuit Court for said east half, and obtained a judgment. Then he exhibited his petition in said Court, under the occupying claimant law; but he died before final disposition thereof. Since his death, the respondents presented their petition, in that behalf, in the same Court; and such proceedings were thereon had, that the value of the land was found to be 320 dollars, and of the improvements thereon 810 dollars. That the time fixed by the Court within which the successful claimants should pay for said improvements had elapsed; and the time of payment for the land was also designated, but had not expired. The respondents allege that they will pay said 320 dollars when it becomes due, and they

Nov. Term, 1853.

WEED v. EDMONDS.

are willing that the administrator of *Chapin* shall have it; but they object to the sale, &c.

The cause was submitted, &c., and the Court found the answer to be true; and the petitioner having waived his right to an order for the sale of the said east half, it was ordered that the *McQuilkins* should pay the 320 dollars to said administrator within one hundred and twenty days. And upon proof, it was further ordered that the west half of said land be made assets, &c., and that it should be sold, &c.

The land in question is described as the "South-east quarter of sect. 19, T. 12: 9." This description is objected to as insufficient. The objection is well taken. The statute relative to the objects of this petition, requires that "a description of the real estate liable to be made assets," &c., "shall be set forth in the petition." R. S. 1843, c. 30, s. 221. The location of the premises should be pointed out with some degree of certainty, otherwise the record does not present a foundation upon which a title will likely rest without dispute. The words and figures used in the record as descriptive of the land, do not show that it is within *Vigo* county, or even within the state. Therefore, it is left uncertain whether the cause of action was properly before the Court. Again, the petition should have been verified. The language of the statute is, "such petition shall be verified by the oath or affirmation of the administrator presenting the same." R. S. 1843, c. 30, s. 222. It is true, this verification may be waived. Where a party appears and contests the suit, such waiver will be presumed. But in the case before us, the non-resident defendants did not appear. As to them the petition must be considered insufficient.

Another ground is taken against the validity of these proceedings. It is alleged that the order directing the payment of 320 dollars, is erroneous. We are of that opinion. In support of the order in question, the petition makes no case. It states that the *McQuilkins* set up some claim, &c., to the land, but alleges nothing relative to the 320 dollars. In equity, the principle is well settled

that the relief granted must be agreeable to the case made by the bill, and not different. Mitford 24.—*James* v. *McKernon*, 6 Johns. R. 543.—19 *id.* 505. We think the rule just stated is applicable to this proceeding.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

A. Kinney, *S. B. Gookins*, and *J. P. Usher*, for the plaintiffs.

C. W. Barbour, for the defendants.

THE SHELBYVILLE LATERAL BRANCH RAILROAD COMPANY *v.* LEWARK.

The plaintiff below came to the depot of the defendants' railroad at *S.*, with his wagon, to haul to the town of *R.* a load of dry-goods, and was directed by the defendants' agent who had charge of the depot, where to back his wagon and receive the load. While he was engaged in loading the wagon, at the place designated, through the defendants' negligence it was run into by the defendants' cars and seriously damaged, so as to be unable to convey its load. In an action on the case the Court, upon these facts appearing, instructed the jury that the measure of damages was the damage done to the wagon, the loss of the trip in which the plaintiff was engaged, and the loss of the use of the wagon until, by proper diligence, the plaintiff could get it repaired. *Held*, that the instruction was correct.

Saturday, December 3.

ERROR to the *Johnson* Circuit Court.

DAVISON, J.—Trespass on the case by the defendant in error against the plaintiffs in error, for injuries resulting from the negligence, &c., of the plaintiffs' servants. The cause was, by change of venue, taken from the Circuit Court of *Shelby* county to the *Johnson* Circuit Court. Plea, not guilty. Verdict for the plaintiff below. Motion for a new trial overruled, and judgment on the verdict.

Nov. Term, 1853.

THE SHELBYVILLE LATERAL BRANCH RAILROAD CO. v. LEWARK.

The evidence is upon the record. It shows that the defendant came to the plaintiffs' depot at *Shelbyville*, for the purpose of hauling therefrom to *Rushville* a wagon load of store-goods; that he was directed by one *Hopkins*, who had charge of the depot as agent of the plaintiffs, to back his wagon up to the south-east corner of said depot. He accordingly did so. The wagon then stood upon one of the side tracks or switches of said railroad. While he was engaged in loading it from the depot, several burthen cars were run off the main track of the road on to the switch where the wagon was standing. These cars ran against and into said wagon and injured it. Upon the inquiry whether the damage done to the wagon was caused by the negligence of the plaintiffs' servants, there is a slight conflict in the testimony; but we think the evidence fully authorized the jury to answer that question in the affirmative. It was shown that, in consequence of the injury, the defendant was prevented from hauling the store-goods he was then putting into his wagon. And the space of time it would require to repair the wagon, was also proved. The defendant, over the plaintiffs' objection, was permitted to prove the amount he would have made by hauling said load, and what the use of the wagon would have been worth while it was undergoing repair.

Various instructions were moved by the defendants below, but overruled by the Court. These will not be further noticed, as by the charge given all the questions in the cause are raised.

The Court instructed the jury, *inter alia*, as follows: "It is not disputed but that the plaintiff's wagon was, by leave of the defendants, standing on the railroad switch at the depot at *Shelbyville*, in the act of receiving freight, subject to removal upon the coming in of the cars; nor that these cars, on coming in, ran into the wagon and seriously injured it. In this state of the case it was incumbent on the defendants, by some agent or officer, to notify the plaintiff of the approach of the cars, verbally or by some known signal, in time to enable him to remove his wagon by using reasonable diligence and alacrity. If the de-

fendant failed to give such notice, the plaintiff has a right to recover the value of the damage done to his wagon, for the loss of the trip in which he was engaged, and for the loss of the use of the wagon till by proper diligence he could get it repaired."

This charge, so far as it relates to the loss of the trip and the loss of the use of the wagon while it was being repaired, is alleged to be erroneous. These items of loss are set forth in the declaration, and are, in our opinion, sustained by the evidence. The charge states, hypothetically, that the injury done to the wagon resulted from the negligence of the plaintiffs' servants. If this was the case, "the law will not nicely attempt to limit the amount of reparation." The compensation should be for the entire damage resulting from such negligence. It is true, remote, uncertain or speculative damages will not be allowed. Nor was the jury, in this case, instructed to give damages of that character. The items of damage referred to, were, no doubt, the immediate consequence of the breaking of the wagon. And it seems to us that the jury, under the evidence in the cause, could have no difficulty in estimating, readily and with precision, what the defendant would have made by the trip in which he was engaged, and what the value of the use of the wagon would have been to him while it was undergoing repair. These damages were not speculative, like the loss of profits, &c.

In the *New Haven Steamboat Company* v. *Vanderbilt*, 16 Conn. R. 420, it was decided, in an action to recover damages for injuries done to the plaintiff's steamboat, *Belle*, by the defendant's steamboat, *New Haven*, "that the plaintiff was entitled to recover, as damages, a reasonable sum for the injuries which the boat had sustained by the conduct complained of, and a reasonable sum for her detention while she was undergoing repair."

A late decision in the Supreme Court of the *United States* appears to support the view we have taken. An action was brought by the owners of the steamboat *Major Barbour* against the owners of the *Paul Jones*, another

Nov. Term, 1853.

THE WHITE WATER VALLEY CANAL COMPANY v. HAWKINS.

steamboat, for injuries resulting from a collision between the boats, by means of which the *Major Barbour* became filled with water and sunk. It was held that the proper measure of damages was a sum sufficient to raise the sunken boat, repair her, and compensate the owners for the loss of her use during the the time she was being refitted. *Williamson* v. *Barrett*, 13 Howard 101.—4 McLean 589. The rule laid down in these cases is, no doubt, just and equitable. The principle is to indemnify the party injured—to compensate him for any loss which is the immediate result of the wrongful act.

We think the instructions given in the case before us, are unexceptionable.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

M. M. Ray and *W. J. Peaslee*, for the plaintiffs.

T. A. Hendricks, *J. Morrison* and *S. Major*, for the defendant.

THE WHITE WATER VALLEY CANAL COMPANY *v.* HAWKINS.

H. having on the 13th of *April*, 1846, made a special deposit in the office of the *White Water Valley Canal Company* of 2,500 dollars in the small certificates of stock of the company, the treasurer gave him a certificate signed by himself and attested by the secretary, stating the fact, and that the certificate would draw interest for two years from that date, at 6 per cent.; but if the deposit should be removed and the interest demanded before the expiration of that time, the interest might be paid, at the option of the company, in like funds with those deposited. One-half of the deposit was withdrawn at different periods before, and the residue after, the expiration of the two years. After the withdrawal of the entire deposit, the secretary computed the interest which had accrued upon it, and entered it to *H.'s* credit in his account on their books, and afterwards, upon demand being made, refused to pay it. These transactions

took place in the office, and through the regular and acknowledged officers, of the company.

Held, that the contingency upon which the company had an option to pay the interest in money or stock, never occurred.

But, *held*, that admitting that the withdrawal of the one-half of the deposit within the two years gave the company the option to pay the interest on that half in cash or certificates, still that was an option they were bound to exercise within a reasonable time.

Held, also, that such reasonable time was when *H.* demanded the interest after the expiration of the two years.

Held, also, that the computation of the interest due and the entering of the same by the secretary on the company's books, together with the fact that there was no refusal to pay the interest on the deposit when demanded, amounted to a new contract, founded upon a good consideration, to pay the sum found by the secretary to be due.

Held, also, that the company were bound, under the circumstances, by the acts of their officers.

ERROR to the *Fayette* Circuit Court.

Monday, December 5

ROACHE, J.—Assumpsit on the common counts for money paid and for interest due on certificates of indebtedness. Plea, the general issue. Judgment for the plaintiff below for 302 dollars and 7 cents.

The proof was as follows:

The plaintiff, *Hawkins*, paid for the use of the defendants, 39 dollars and 77 cents. Also, on the 13th of *April*, 1846, *Hawkins* received from the defendant the following instrument:

"Dollars 2,500. Office of the treasurer of the *White Water Valley Canal Co. April* 13th, 1846. This certifies that on this date *Daniel Hawkins* made a special deposit of twenty-five hundred dollars in my office, in the small certificates of the stock of the company, which will draw interest from date, at the rate of six per cent. per annum for the term of two years. If the deposit be removed and the interest demanded prior to the expiration of said time, the interest may be paid, at the option of the company, in like funds with those deposited. *B. P. Hagerman*, Tr. Attest, *L. B. Tupper*, Sec'y."

The plaintiff withdrew of said deposits 500 dollars on the 24th of *February*, 1847; 100 dollars on the 19th of *February*, 1848; 650 dollars on the 21st of *February*, 1848;

Nov. Term, 1853.

THE WHITE WATER VALLEY CANAL COMPANY v. HAWKINS.

1,250 dollars on the 24th of *April*, 1848. The withdrawals were the same certificates deposited.

At the time the last withdrawal of 1,250 dollars was made, the secretary of the defendant cast up the interest on the deposit, which he ascertained to amount to 202 dollars and 70 cents, which sum he passed to the credit of the plaintiff, on the books of the company. The interest was demanded before the suit was brought, and was not paid.

This was all the evidence.

The plaintiff in error contends, first, that for the 1,250 dollars withdrawn before the expiration of the two years, the plaintiff could have no right to demand anything but similar certificates, or their value, and that he should show a demand specially of such certificates to enable him to recover them.

This is a misapprehension of the terms of the certificate of deposit. The certificate provides for the payment of 6 per cent. interest on the deposit. Without some restriction of the language, the interest would be payable in money. But then follows a condition. It is provided that if the deposit be removed and the interest demanded prior to the expiration of two years, the company shall, if they elect so to do, have the option to pay the interest in like certificates.

In the case at bar, the interest was not demanded until after the expiration of two years. According to the terms of the contract, the contingency upon which the plaintiffs in error were to become entitled to an option, never occurred.

But admitting that the withdrawal of 1,250 dollars within the two years, entitled the company to elect whether she would pay the interest on that sum in cash or certificates, that was a right to elect which she was bound to exercise within a reasonable time. She could not hesitate to elect when called on to determine. The reasonable time to make the election was when called on by the defendant after all the deposits were withdrawn, and after the expiration of the two years. It is shown that a demand was

made. Having failed when called on, at a proper time, to elect, her right to do so is gone, and the defendant has a right to demand payment in money.

The plaintiff further contends that this judgment, to the extent of the interest allowed, is erroneous. It is a general principle, that a suit will not lie for the recovery of interest after the principal has all been paid. *Comparet* v. *Ewing*, 8 Blackf. 328. If there was not a clear distinction between this case and the case at bar, we should be inclined to follow the authority, although the reason on which the decision proceeds is not very apparent. A material fact exists in the present case which was wanting in *Comparet* v. *Ewing*, *supra*, and *Dixon* v. *Parkes*, 1 Esp. R. 110, which it cites and follows. The latter case was an action of debt on a bond payable twenty-one days after the ship's arrival at *Canton;* but, if not then paid, there was reserved an increase of interest. The bond was not paid till three months after the expiration of the twenty-one days, when the defendant paid the principal but refused to pay any interest for the three months. Lord *Kenyon* held, that in that form of action, the plaintiff having received the principal, could not recover the interest, on the ground that interest in such action could only be given by a jury, in the form of damages, and as the principal was paid, there could be no verdict for it, and that being gone, everything founded on it must go too.

Here, saying nothing as to the fact that this was not a money transaction, but partook of the nature of a bailment for hire for which compensation was to be made under the name of interest, when the principal was paid there was no refusal to pay the interest; but, on the contrary, the plaintiff herself, through her proper officer, computed the interest due and entered the amount to the credit of the defendant, in his account on her own books. We regard the transaction as amounting to a new contract to pay the sum the secretary found to be due, and it was founded on a good consideration—the liability of the party to pay the interest.

Nov. Term, 1853.

THE WHITE WATER VALLEY CANAL COMPANY v. HAWKINS.

The plaintiffs allege that it is not shown that the acts of the treasurer and secretary were authorized by the corporation, and are not, consequently, binding on them. It is admitted that the persons acting as such, were the regular officers of the corporation. It seems that these transactions all took place in the office of the company. The item of interest was entered on the books of the company. Those books were under the control and subject to the inspection of the company. The acts were not a single act, but were a series of transactions continuing through a period of more than two years. By it the plaintiffs got the benefit of the use of the property of the defendant during that period. These officers were held out by the plaintiffs to the world as the officers for the transaction of their business. The evidence is sufficient to warrant the conclusion that this transaction came under the knowledge of the proper authorities, who had access to the books, and whose duty it was to inspect them. It is too late now for them to repudiate these acts. Although the acts of the officers were, in the first instance, unauthorized, the acquiescence of the corporation, during the whole transaction, and the enjoyment of the advantages of it, amount to a ratification and adoption of it. *The President, &c., of the Highland Turnpike Company* v. *McKean*, 10 Johns. R. 154.—Ang. and Ames on Corp. 284, 292, 304.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

J. S. Newman for the plaintiffs.

S. W. Parker, for the defendant.

Nov. Term, 1853.

Ex Parte TAYLOR.

Monday, December 5.

HARPER *v.* NEAL.

ERROR to the *Randolph* Circuit Court.

ROACHE, J.—This was an action of slander brought by *Neal* against *Harper*. There was a trial by jury; verdict and judgment for 100 dollars. There are no briefs filed by either party. The assignment alleges the error to have consisted in the giving of certain charges to the jury, and in the refusal of certain others asked for by the defendant below.

Upon examination, we are unable to perceive any errors in the charges given by the Court.

The defendant asked for twenty-four instructions, seventeen of which were given. We are of opinion that the instructions given embrace all the law pertinent and applicable to the case, and include all that was either pertinent or applicable in those that were refused.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

T. J. Sample and *W. A. Peelle*, for the plaintiff.

D. Kilgore, for the defendant.

In the matter of TAYLOR and Others. Ex Parte.

Where a change of venue was taken, under the R. S. 1843, in a criminal cause, the county from which the change was taken was liable to the clerk for his fees in making out a transcript of the proceedings and forwarding the same to the county to which the change was taken, and to the clerk and sheriff of the latter county for their fees in the case, irrespective of the conviction or acquittal of the defendant.

It was the duty of the Court to which the change was taken, under the R. S. 1843, upon a proper motion, to audit and allow such fees.

Nov. Term, 1853.

Ex Parte TAYLOR.

Monday, December 5.

ERROR to the *Switzerland* Circuit Court.

PERKINS, J.—This was a motion by certain of the officers of *Jefferson* and *Switzerland* counties to the *Switzerland* Circuit Court, for the grant of a certificate to the proper authorities of *Jefferson* county, *Indiana*, of the auditing by the Court, for payment by said county, of the following fees in the case of *The State* v. *Curry*, being an indictment for murder in the *Jefferson* Circuit Court, and, by change of venue, sent to and tried in the *Switzerland* Circuit Court. The items of said fees are:

Seven dollars and 20 cents to the clerk of the *Jefferson* Circuit Court, for transcript of the proceedings in that Court to the change of venue, and forwarding the same to *Switzerland* county.

Twenty-three dollars and 80 cents to the clerk of the *Switzerland* Circuit Court for fees in the case in that Court.

Eighteen dollars and 74 cents to the sheriff of *Switzerland* county for his fees in the case.

The Circuit Court refused the motion. The correctness of that decision depends on the proper construction of ss. 99, 100, and 101, p. 1002, R. S. 1843, which read as follows:

"Sect. 99. In all changes of venue under the provisions of this article, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, the *per diem* allowance of the associate judges, and expenses of the jury trying the cause, the necessary expenses incurred by or on account of the officers' attending such trial, and of the whole panel of jurors in attendance during the time of such trial, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant.

"Sect. 100. All costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the Court trying any such cause; but where specific fees are allowed by law for any duty or service, no more or other costs

shall be allowed therefor than could be legally taxed in the Court from which such change was taken.

"Sect. 101. Sheriffs, for delivering prisoners to the sheriffs of other counties, under the provisions of this article, shall receive the same fees therefor as are allowed for the conveyance of convicts to the state prison."

It is admitted that the above fees are charged at the usual rate for such services, and it is plain that they were necessary and consequent upon the change of venue; and we think the Court should have audited and allowed them.

They are for the performance of services which, but for the change of venue, said officers would not have been called upon to perform, and it seems to us that the statute above quoted plainly means that the county from which the change occasioning such costs is taken, shall pay them, irrespective of the conviction or acquittal of the defendant.

Its language seems plainly to bear no other construction, and we perceive no equitable consideration in the case that should induce a Court to attempt to seek for any other.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Kelso, for the plaintiffs.

Sibert *v.* Humphries.

Money collected by a sheriff upon an execution in favor of *A.*, and paid over by the sheriff to the clerk of the Circuit Court from which the execution issued, is not subject to levy, while in the hands of the clerk, upon an execution issued against *A.*

Nov. Term, 1853.

SIBERT v. HUMPHRIES.

The identical money paid by the sheriff to the clerk in satisfaction of an execution does not, by such payment, vest in the execution-plaintiff as his property.

ERROR to the *Johnson* Circuit Court.

Monday, December 5.

PERKINS, J.—Assumpsit. Judgment below for the plaintiff. The action was by *Humphries* against *Sibert*, for money had and received.

The facts are, that *Sibert* was the clerk of the *Johnson* Circuit Court; that money was paid to him as such clerk, by the sheriff of *Johnson* county, which the latter had collected on an execution in favor of *Humphries;* that *Sibert*, while said money was so in his hands, permitted the same to be levied on and taken by the sheriff of *Jefferson* county, on an execution against said *Humphries;* and that *Humphries* demanded the money and *Sibert* refused payment before this suit was brought.

The question is, whether said money was subject to be so taken on execution while in the hands of said clerk. If it was, he did right in permitting it to be done. If it was not, he did wrong, and is liable for the amount in this action.

It has been decided at the present term, that money collected by an officer on execution is not subject to be levied on by execution while it remains in his hands prior to its payment to the person entitled to receive it, on the ground that it does not, till such payment, become the property of such person. *Winton* v. *Ezra*, *ante*, p. 321. Does the present case fall within the same principle?

According to the statute in force at the time the facts above set out transpired, sheriffs and constables paid the moneys collected on executions to the officers issuing them, and they paid over to the persons entitled; though now, by statute, sheriffs and constables pay moneys collected directly to the execution-plaintiffs.

The money in this case, then, was rightly paid to the clerk, and when he received it, he and his sureties became liable to the execution-plaintiff for the amount.

But the question is, did the identical pieces of coin, or bank bills, paid by the sheriff to the clerk, vest, on such

payment, in the execution-plaintiff in whose favor they had been collected, as his property? We think not, and for the following reasons:

1. The clerk was not bound to pay those identical pieces or bills to said execution-plaintiff. When the latter should call for his money, the clerk could force him to take the amount in the legal currency of the country, and might pay him in anything that he was willing fairly, without fraud, to accept.

2. The execution-plaintiff would not necessarily be bound, and might, in some cases, actually refuse, to receive the identical pieces or bills the clerk had taken. In case of bank-bills the execution-plaintiff would have a right to refuse to accept them, and in cases of coin, if the pieces were counterfeit, or diminished in weight by abrasion, &c., he might refuse them. In short, the articles which the clerk had accepted, and might be willing to retain, would not become the property of the execution-plaintiff till he had accepted them, and hence, would not, till after acceptance, be subject to execution as his property.

Per Curiam.—The judgment is affirmed with costs.

F. M. Finch, for the plaintiff.

G. M. Overstreet and *A. B. Hunter*, for the defendant.

WORTHINGTON *v.* McDONALD and Another.

Assumpsit by the payees against the maker of a promissory note given for the balance of the purchase-money of two lots in *A.*, to be liquidated in warehouse commissions from time to time as the payees might call for or demand—said commissions to be in accordance with the regular rates of other established houses in said town of *A.* Averment, that on,

Nov. Term, 1853.

WORTHINGTON v. MCDONALD.

&c., at, &c., the plaintiffs called for and demanded of the maker warehouse commissions at the regular rates, &c., and that he refused to pay in warehouse commissions, &c.—pursuing the language of the note. General breach, that the defendant had not paid the money in the note specified, &c. *Held*, that the declaration was bad on general demurrer.

Monday, December 5.

ERROR to the *Fountain* Circuit Court.

STUART, J.—*McDonald* and *Spears* sued *Worthington* in assumpsit on a promissory note for 1,000 dollars. Demurrer to the declaration overruled, and judgment for the plaintiffs below.

The note is set out according to its legal effect. It is alleged to be for the balance of the purchase-money of two lots in *Attica*, and in the language of the declaration, "to be liquidated in warehouse commissions from time to time, as the payees may call for or demand; said commissions to be in accordance with the regular rates of other established houses in said town of *Attica*." The plaintiffs then aver that at, &c., on, &c., they called for and demanded of *Worthington* warehouse commissions at the regular rates, &c., and that he refused to pay in warehouse commissions, &c.—the pleader strictly pursuing the language of the note. General breach, that *Worthington* had not paid the money in the note specified, &c.

Were we at liberty to infer what might possibly be the facts in this case, we might say that *Worthington* had a warehouse in *Attica*, and that the defendants in error were wheat-buyers and wanted a place to store wheat from time to time as they might need; that the commissions arising from such storage, according to the established prices at *Attica*, should go in liquidation of the note. Let it be further supposed that the payees of the note called upon *Worthington* from time to time to store for them a reasonable quantity of wheat, and he refused. The plaintiffs below might then have a right to demand payment in cash. But it is too much to ask the Court to imagine all these facts. They should have been set out with proper introductory matter and averment in the declaration. The contract evidently implies something to

be done on the part of the plaintiffs below before they were entitled to demand either warehouse commissions or cash.

The plaintiff in error refers to several authorities, viz., 1 Chitty Pl. 332–3.—2 Gill and J. 441.—1 Saund. R. 32.—2 *id.* 181, b.—6 Taunton 45. *Chitty's* annotators cite these authorities, but it will be found, on close examination, that they do not support the text. Even the same author cites 1 Price 109 *contra.* The dictum from *Gill* and *J.* is an isolated introductory remark of the judge, having no particular connection with the facts of the case.

It is well settled that in many cases the breach may be assigned in general terms. Thus, on a bond by a deputy sheriff, such general assignment was held sufficient. 5 Johns. R. 168.—8 *id.* 111.

But there is another class of cases to which a different rule is applicable. Where the terms of the contract leave its meaning ambiguous, if the breach were assigned generally, without proper introductory matter and corresponding averments, the Court might not know what judgment to render. Bac. Ab., Pleas, B., 1. Accordingly, it is held that the pleader should not leave the facts to inference, but should allege them with precision and certainty. 9 Johns. R. 291.—Lawes Pl. 54. General pleading cannot be supported. 1 Bos. and Pull. 98. Thus, the plaintiff declared that in consideration that he, plaintiff, delivered all the corn in a certain barn the defendant assumed and promised, &c. The plaintiff averred that he did deliver the corn in the barn, but did not show there was any corn there, and it was agreed that the declaration would have been bad on demurrer. Bac. Ab. *supra.* See also Arch. Civ. Pl. 151–2. So here, the term "warehouse commissions," and the implied storage of goods from time to time, at the established rates, indicate a series of extraneous facts not elsewhere alluded to or explained in the declaration. They are ambiguous, and the ambiguity must be taken most strongly against the pleader. 6 Blackf. 458. The declaration is bad on general demurrer.

Nov. Term, 1853.

MUIRHEAD v. SNYDER.

Per Curiam.—The judgment is reversed with costs. *D. Brier*, *D. Newell* and *D. W. Voorhees*, for the plaintiff.

MUIRHEAD *v.* SNYDER.

Where a special plea is demurred to, but the matter alleged in the plea is admissible under the general issue, which is pleaded, it is immaterial what, or whether any, disposition was made of the demurrer.

Assumpsit against the maker of a note. Plea, the general issue. The declaration described the note as made by *Ephraim S. Muirhead*, and the plaintiff offered in evidence a note signed *E. S. Muirhead*. *Held*, that the note was admissible as conducing to prove the issue on the part of the plaintiff.

Where the verdict and judgment are fully supported by the evidence, it is immaterial what instructions the Court gave to the jury.

Monday, December 5.

ERROR to the *Kosciusko* Circuit Court.

STUART, J.—*Snyder* sued *Muirhead* on a promissory note. Pleas, the general issue, and a plea in bar setting up matters relating to an arbitration. To the second plea the plaintiff demurred specially, that it amounted to the general issue. What disposition was made of the second plea and demurrer, the record does not disclose. The next step is, that the parties went on to trial by jury on the issue joined. Verdict and judgment in favor of the plaintiff for the note and interest.

As the general issue was the only one joined, it must have been upon that the trial was had. The matter contained in the plea was admissible under that issue. So that the final disposition of the plea and demurrer, or whether they were disposed of at all, is not material. The record contains all the evidence, and shows that the

defendant adduced the substantial matter of the plea on the trial.

The defendant, *Muirhead*, makes several objections to these proceedings, two of which only claim attention as having been made in the Court below.

One objection relates to the note offered in evidence. The declaration describes the note as made by *Ephraim S. Muirhead*. The note offered in evidence was signed *E. S. Muirhead*. For this reason, objection was made to its introduction. But the Court overruled the objection, and the note went to the jury without any other evidence or explanation on the part of the plaintiff below. The plaintiff in error relies entirely on the case of *Louden* v. *Walpole*, 1 Ind. R. 319. It is true that decision is directly in point; but were we not trammeled by its authority, we should feel disposed to fall back upon the reasoning in *Lasselle* v. *Hewson*, on the same question, and the authorities there cited. 5 Blackf. 161. The cases are somewhat different in their facts. There was explanatory evidence in the one, and none in the other. But the Court remark: "The defendant may always have inspection of the note on which he is sued before he pleads." This reasoning seems to us conclusive. If it is not his note, he may file the general issue under oath. If he goes to trial at random, without inspection, it is his own fault. It is not good policy to learn defendants to lean on the Court to avert the consequences of their own neglect. When he goes to trial he may be presumed to have had inspection, and the objection to the signature comes too late.

But in this case we are not under the necessity of reconciling these two decisions, nor of overruling either. The evidence of the defendant below, which is all set out in the bill of exceptions taken by him on the overruling his motion for a new trial, supplies the link in the plaintiff's chain, if indeed there was any wanting.

It must be conceded that the note was properly admitted as conducing to prove the issue. Even in *Louden* v. *Walpole*, *supra*, the Court say the note was properly enough

Nov. Term, 1853.

BAILEY v. RICKETTS.

admitted. The only question was as to its sufficiency to warrant the verdict and judgment. In the case at bar, the defendant introduced one *Carpenter* as a witness, who gave a detailed history of the note. The evidence for the defence brings the case clearly within the doctrine laid down in *Louden* v. *Walpole*, and fully sustains the verdict.

2. *Muirhead* complains that the Court erred in overruling his motion for a new trial. We think otherwise. From the evidence, the ruling of the Court in this respect was clearly correct.

Something is said about the instructions which also appear in the record. But as the verdict and judgment are supported fully by the evidence, it is wholly immaterial what instructions the associate judges who tried the case gave to the jury.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

O. H. Smith, *S. Yandes* and *J. B. Chapman*, for the plaintiff.

BAILEY *v.* RICKETTS and Others.

A. agreed to deliver to *B.*, between the 20th of *December*, 1851, and the 1st of *January*, 1852, four thousand shoulders, &c., to be paid for at the time of delivery. The place of delivery was not designated. *Held*, in a suit by *A.* against *B.* for the non-performance of the agreement, that the property should have been delivered to *B.* where *A.* had it at the time of the sale, or at *A.'s* usual place of business, and that a request to deliver it was unnecessary. But, *held*, that the declaration should have contained an averment that the plaintiff, at the time and place of delivery, was ready to receive and pay for the goods.

Where, by the statute of frauds, it is requisite that a contract sued upon should be in writing, the declaration need not aver that it was so—the provisions of the statute affecting only the rules of evidence and not those of pleading.

The time fixed for the performance of a contract was "the latter part of *January*." *Held*, that the phrase must be construed to mean the whole of that part, and that a suit would not lie for the non-performance of the contract until the expiration of the month. *Held*, also, that the declaration of the defendants, before the end of the month, that they would not then, nor ever, deliver the goods, did not excuse the plaintiff from deferring suit until the end of the month.

ERROR to the *Jefferson* Circuit Court.

Monday, December 5.

DAVISON, J.—This was assumpsit commenced on the 24th of *January*, 1852, by the plaintiff against the defendants. The declaration contains seven counts. The defendants demurred severally to the first six. The demurrers were sustained. A nonsuit was taken as to the seventh count. Judgment was given for the defendants.

The first count is on a contract whereby the defendants promised the plaintiff to deliver him certain goods, viz., four thousand shoulders and two thousand hams, between the 20th of *December* 1851, and the 5th of *January*, 1852, for a specified price, to be paid on delivery. No place of delivery is designated in the contract; nor is there any allegation of a special request upon the defendants to deliver, &c. There is an averment that the plaintiff was at all times ready, &c., to receive and pay for the goods, according to the contract, to-wit, at, &c., of which the defendants had notice; and that they refused, &c. The fifth and sixth counts are in substance the same as the first.

These counts set forth a contract of sale. The time for delivery of the goods is stated, but no place was agreed on. Then, should the plaintiff have alleged a special request on the defendants to deliver the goods? The solution of this inquiry depends upon whether the nature of the contract points out the place of delivery. The law makes a distinction between a promise to pay an existing debt in specific articles, and a contract of sale. Where goods are to be delivered and the time is fixed, but no place designated, the debtor may call upon the

Nov. Term, 1853.

BAILEY v. RICKETTS.

creditor to appoint a place of delivery. 2 Kent's Com. 505 *et seq.* "The debtor must show that he was ready to deliver the goods at the time and place appointed." 3 Blackf. 153. But in the contract before us the rule is different. The goods should have been delivered at the place where the defendants had them at the time of sale, or at their place of business. *Id. supra.* The law thus fixes the place of delivery. It was alike known to each party. And to sustain this action, a request to deliver the goods was not requisite.

However, in this case, the delivery and payment were to take place at the same time, and were to be concurrent acts. Neither party could have sustained a suit on the contract without alleging performance. The plaintiff, to complete his cause of action, should have averred that he was, at the time and place of delivery, ready to receive and pay for the goods. This he would have been bound to prove on the trial, whether the defendants were then and there ready to deliver or not. *Porter* v. *Rose*, 12 Johns. R. 209. None of these counts aver that the plaintiff was ready, &c., at the place of delivery. They are, on that account, substantially defective.

The third count sets forth a contract in writing for the delivery of the goods mentioned in the first. It alleges the payment of 2,100 dollars on the contract, and avers that it was modified: that is, the time of performance was, by consent of the parties, enlarged to the latter part of *January;* that in the latter part of *January*, viz., on the 24th of that month, the plaintiff called upon the defendants to deliver, but they refused and declared that they would not then, nor at any other time, deliver said goods. The second and fourth counts are in effect the same as the third.

In support of the demurrers to these counts, it is contended that the agreement to enlarge the time of performance is not stated to be in writing, and that, therefore, the plaintiff should have shown that it was founded upon a consideration. This position is not correct. "Where by the statute of frauds it is requisite that a

contract sued on should be in writing, the declaration need not state that it was so. The provisions of this statute affect only the rules of evidence, and not those of pleading." 1 Chitty Pl. 301, 304. The agreement to extend the time, &c., does not appear to have been verbal, and, in the absence of any averment on the subject, we will presume that it was in writing.

Another objection is raised to these counts. This suit was instituted on the 24th of *January*, when the time of performance was extended to the latter part of that month. It has been decided that where, by the terms of the contract, one party was to perform certain labor, and the other, in consideration thereof, to pay a sum of money in a certain month, an action commenced on the last day of the month was prematurely brought. Chitty on Cont. 730, 731. *Harris* v. *Blen*, 4 Shepley 175. The terms, "latter part of *January*," must be construed to mean the whole of that part. It follows that this suit was not maintainable until after the expiration of that period.

But it is insisted that the statement of the defendants, that "they would not then, nor at any other time, deliver the goods," excused the plaintiff from waiting longer. We are not of that opinion. That statement did not incapacitate them from fulfilling the contract. It was still within their power to perform within the time stipulated. Until the expiration of that time we know of no principle upon which they could be held liable.

The demurrers were well taken.

Per Curiam.—The judgment is affirmed with costs.

J. Sullivan, for the plaintiff.

J. G. Marshall, for the defendants.

Nov. Term, 1853.

Keck v. Umphries.

Keck *v.* Umphries.

Where, on a motion for a new trial, the inquiry arises, what was the evidence given to the jury, an affidavit of the defendant as to his belief of what was proved, derived from recollection, or from information received from the jury or his counsel, will be allowed no weight against the ruling of the Court.

Slander for charging the defendant with larceny. Plea, not guilty. Verdict for the plaintiff. The defendant moved for a new trial on the ground that the words proved on the trial, if spoken at all, were not spoken on the occasion alleged by the witness, but on a subsequent one. Neither of the affidavits offered in support of the motion, denied the speaking of the words. *Held*, that they did not, therefore, sustain the motion.

New trials are rarely, if ever, granted to give an opportunity to impeach the credit of a witness.

Monday, December 5.

ERROR to the *Shelby* Circuit Court.

Davison, J.—*Umphries* sued *Keck* in an action of slander. The declaration charges the speaking of various sets of words, and among them the following, viz.: "*Andy* and *Umphries* are the d—d rascals who took my money." Plea, not guilty. Verdict for the plaintiff below. Motion for a new trial overruled, and judgment on the verdict.

In support of this motion *Keck* filed two affidavits—his own, and the affidavit of one *William Hacker*. *Keck*, in his affidavit, states substantially that upon the trial *Umphries* called one *David Roedefer*, who testified that he was present in front of the court-house in *Shelbyville*, on the afternoon of the 30th of *October*, 1850, when he heard him, *Keck*, speak the above words. This was immediately after *Andrew Derickson* and *George Umphries* had been, on the complaint of said *Keck*, tried for larceny. He further states that the above set of words, in the opinion of the jury, were the only words proved on the trial, as the jury informed him. His counsel also informed him, and he believes it to be true, that no other set of words was proved by other witnesses. And he verily believes that the verdict was found alone upon *Roedefer's* testimony. That after the verdict was given he discovered that he

could prove by the said *Hacker*, that the words sworn to by *Roedefer* were spoken, if spoken at all, on the 7th of *January*, 1851, on the occasion of another and different trial, and more than a month after this suit was commenced. The fact that he could make such proof by *Hacker*, or any other witness, was unknown to him until after the verdict was rendered, &c.

The affidavit of *Hacker* states, in substance, that on the 22d of *August*, 1851, he had a conversation with *Roedefer* in *Shelbyville*. *Roedefer* asked him if he remembered certain words spoken by *Keck* in front of said court-house immediately after *Derickson*, on complaint for surety of the peace, had been tried before justice *Kirk*? *Hacker* replied that he did not. *Roedefer* then stated that the words spoken on that occasion were these, viz.: "I do not blame *Umphries;* but *Billy* and *Andy* are the d—d rascals that took my money." He called *Hacker's* attention to the fact that he, *Hacker*, had acted with squire *Kirk* on the trial of the surety case, and stated that when *Keck* spoke the words, *Hacker* was standing near the court-house in conversation with one *Davis*. *Roedefer* said there was a difficulty between him and *Keck*. He was subpoenaed in this case, and wished to find out some other who recollected of having heard the words spoken. He did not wish to go into Court and testify without some one to sustain him. The affidavit also states that *Hacker* was present at the trial of the surety case, and acted with esquire *Kirk* in the examination of it. This trial took place after the present suit was commenced. That he was standing near the court-house door, and in conversation with the said *Davis* at the time stated by *Roedefer*. That *Keck* was there, but he, *Hacker*, did not hear the above words spoken. The trial of *Derickson* and *Umphries* took place in *October*, 1850. He was not present at that trial, nor did he know of it until some days afterwards, &c.

Upon the hearing of this motion, it seems to have been a subject of inquiry whether any words other than those sworn to by *Roedefer*, were proven on the trial. Relative

Nov. Term, 1853.

THE SHELBYVILLE LATERAL BRANCH RAILROAD CO. v. LYNCH.

to this matter, the Court could have had no difficulty in arriving at a conclusion. All the evidence in the cause was before it. And if the speaking of other words was shown, the Court, no doubt, heard the proof. But the evidence is not on the record, and we are not, therefore, in possession of the facts requisite to a proper solution of the question. What *Keck* may have believed or been informed by the jury or his counsel can have no weight against the ruling of the Court. The affidavits, in our opinion, do not sustain the motion. Neither of them denies the speaking of the words. What *Roedefer* stated out of Court might affect his credibility. But "new trials are rarely, if ever, granted," to give an opportunity of impeaching the credit of a witness. 3 Johns. R. 255.—5 *id.* 258.—6 Blackf. 496. We think the Court committed no error in refusing to sutain the motion.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

M. M. Ray and *T. D. Walpole*, for the plaintiff.

W. J. Peaslee und *A. W. Hubbard*, for the defendant.

THE SHELBYVILLE LATERAL BRANCH RAILROAD CO. *v.* LYNCH.

Monday, December 5.

ERROR to the *Johnson* Circuit Court.

Per Curiam.—The judgment in this case is affirmed with 10 per cent. damages and costs, for the reasons given in the case of said plaintiffs against *Lewark* at the present term. (1)

M. M. Ray and *W. J. Peaslee*, for the plaintiffs.

T. A. Hendricks, *J. Morrison* and *S. Major*, for the defendant.

(1) *Ante*, p. 447.

Nov. Term, 1853.

4 495
126 297

THE STATE v. THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL.

THE STATE on the relation of FERGUSON *v.* THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL.

By the 5th specification of the 8th section of the act of 1846 "to provide for the funded debt of the state of *Indiana* and for the completion of the *Wabash* and *Erie* canal to *Evansville*," it was enacted that from and after the first of *January*, 1853, an account of the tolls and revenues of, and the expenditures on, that portion of said canal between *Lafayette*, inclusive, and the *Ohio* state line, should be kept separate and apart from a like account of that portion between *Lafayette*, exclusive, and *Evansville*; and from that time the tolls and revenues derived from the first-named portion, after defraying expenses, &c., should first be applied to make the full interest of five per cent. on the certificates of stock which might be issued for bonds then outstanding and known as *Wabash* and *Erie* canal bonds. The interest was payable on the first days of *January* and *July*. By the tenth section of the supplemental act of 1847, the scale of distribution above set forth was changed, but there was a proviso saving the just rights of the holders of bonds outstanding and known as the *Wabash* and *Erie* canal bonds as provided for in said eighth section. The relator being the owner and holder of 56,712 dollars of the stock of said canal issued in place of principal and interest of the original bonds of said canal surrendered to the state for cancellation in exchange for said stocks, pursuant to the act and supplemental act above named, demanded of the trustees the interest on said stock from the first of *January*, 1853, to the first of *July* of that year, between which periods the trustees kept an account of the tolls and revenues of, and the expenditures on, that part of the canal between the *Ohio* state line and *Lafayette*, which amounted to more than enough, after defraying necessary expenses, repairs and outlays, to pay 5 per cent. interest per annum on the certificates of stock issued on account of the original bonds surrendered and known as *Wabash* and *Erie* canal bonds. A large sum, however, was necessary to finish the canal from *Lafayette* to *Evansville*, and for the work done the trustees were indebted; and, besides the stocks issued on the surrender of the original *Wabash* and *Erie* canal bonds, various other stocks were issued under the act referred to.

Held, that the trustees should have paid the interest demanded, and that, having refused, a *mandamus* would lie to compel them to pay it.

APPEAL from the *Vigo* Circuit Court.

Monday, December 5.

DAVISON, J.—This was a proceeding by writ of *mandamus*, issued from the *Vigo* Circuit Court against said board of trustees. The writ commands them forthwith to pay to the relator 1,417 dollars out of the net tolls and revenues of that portion of said canal between the *Ohio* state line and *Lafayette*, inclusive, or show cause to the contrary thereof.

Nov. Term, 1853.

THE STATE v. THE BOARD OF TRUSTEES OF THE WABASH AND ERIE CANAL.

The relator, it appears, is the owner and holder of 56,712 dollars of *Wabash* and *Erie* canal stocks, duly issued in place of principal and interest of original *Wabash* and *Erie* canal bonds surrendered to the state for cancellation, in exchange for said stocks, pursuant to an act to provide for the funded debt of the state and for the completion of said canal to *Evansville*, and also an act supplementary thereto. See Laws of 1846, p. 3, and Laws of 1847, p. 3.

The sum demanded by the writ is the interest on said stocks from the first of *January*, 1853, to the first of *July* in that year. It also appears, that between these periods, the said trustees kept an account of the tolls and revenues of, and the expenditures on, that part of the canal between the *Ohio* state line and *Lafayette*, and they amounted to more than a sufficiency, over defraying necessary expenses, repairs and outlays, to pay the full interest of 5 per centum per annum on all certificates of stocks that had been issued on account of that class of original bonds surrendered and known as *Wabash* and *Erie* canal bonds.

But the trustees, in answer to the writ, allege that the canal is unfinished. To complete it, the outlay of a large amount of money is still required. For the work already done in its construction, they are now indebted, and it is their duty to apply all said tolls and revenues to the payment of such indebtment, and upon the work required for its completion. That besides the stocks issued on the surrender of the original *Wabash* and *Erie* canal bonds, there is a variety of other stocks issued under the operation of the acts referred to. And it is not intended by these acts that they shall pay from said tolls and revenues the interest on the class of stocks as claimed by the relator, in exclusion of other stocks therein specified, &c.

A demurrer to the answer was overruled, and the proceeding dismissed, &c.

Whether the Court erred by overruling the demurrer, must depend upon the construction to be given to said acts. By the eighth section of the original act, "the bed of the *Wabash* and *Erie* canal and its extensions," &c.,

is vested in said trustees by grant from the state, "and also all the lands and lots (not sold or disposed of) heretofore given," &c., "by the general government to the state to aid in the construction of said canal," &c., "and all moneys due and to grow due," &c., "on account of any sale or sales heretofore made of any canal lands," &c., "in trust and security for the uses and purposes following," &c. The act then proceeds to declare the trusts, and the manner and order in which the trust funds shall be applied toward the liquidation of the different liabilities which the canal and its assets are made to assume under the arrangement of the state debt. And then comes the proviso in the fifth specification of said section, viz.: "From and after the first day of *January*, 1853, an account of the tolls and revenues of, and the expenditures on, that portion of the canal between *Lafayette*, inclusive, and the *Ohio* state line, shall be kept separate and distinct from a like account of that portion between *Lafayette*, exclusive, and *Evansville*, and from and after that period the tolls and revenues derived from the first-named portion, after defraying necessary expenses," &c., "shall first be applied to make the full interest of five per centum per annum on the certificates of stock that may be issued for the bonds now outstanding and known as the *Wabash* and *Erie* canal bonds," &c.

The scale of distribution set forth in the section just referred to, is altered by the tenth section of the supplemental act; but that section contains a provision "saving the just rights of the holders of bonds outstanding and known as the *Wabash* and *Erie* canal bonds as provided for in the said eighth section."

The relator, in accordance with the terms of the law, surrendered a number of bonds of the class designated in the above-recited proviso. Then, does the case presented by the record entitle him to 5 per cent. interest on his certificates of stock, out of the net tolls and revenues of the first-named portion of the canal, from the 1st of *January*, 1853? The proviso constitutes an exception to the general provisions of the act. It evidently discriminates

Nov. Term, 1853.

CLIFTON v. SHANNON.

in favor of the class to which the relator's stocks belong. "From and after the 1st of *January*, 1853," the tolls and revenues derived from the first-named portion, &c., "after defraying expenses," &c., "shall first be applied to make the full interest," &c., "on certificates of stock that may be issued for bonds," &c., "known as *Wabash* and *Erie* canal bonds." This language is very explicit. Indeed, there is no room left for construction. There is, therefore, no difficulty in pointing out the duty of the trustees under the proviso. From and after the period above named, they were bound to keep separate accounts of the revenues of the two sections of the canal. It is admitted that such accounts were kept; that the funds in their hands were sufficient to have met, in full, the interest on all the certificates issued for *Wabash* and *Erie* canal bonds. This interest, by the fifth section of the act, is payable on the first days of *January* and *July*. The record shows that the relator made proper demand of the interest due on his certificates on the first day of last *July*. In view of the facts of this case, we think it was the duty of the trustees to have paid the amount demanded. And they, having failed to do so, the Court, in our opinion, committed an error by dismissing the writ.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

M. G. Bright, for the state.

W. D. Griswold, for the defendants.

CLIFTON *v.* SHANNON.

Where the evidence fully supports the verdict, the judgment thereon will not be reversed on account of an instruction given to the jury which was not strictly correct.

Nov. Term, 1853.

Mix v. Smith

Monday, December 12.

APPEAL from the *Hendricks* Circuit Court.

Perkins, J.—In this case an instruction of the Court is objected to, and the instruction may not have been strictly correct. The evidence, however, is all upon the record; and it so completely supports the verdict that we think the Court below did right in overruling the motion for a new trial, on account of the instruction given. The question was upon the concealment of the cause of action. The plaintiff's evidence left the question in some doubt, but the defendant below, himself, removed all doubt by proving that the plaintiff had not even suspected the cause of action to exist, till within the six years, so carefully had it been concealed.

Per Curiam.—The judgment is affirmed with 2 per cent. damages and costs.

J. S. Harvey, *J. M. Gregg*, *A. A. Hammond* and *H. O'Neal*, for the appellant.

C. C. Nave, for the appellee.

Mix *v.* Smith.

Debt upon a writing obligatory. Plea, that the writing, with three others of like amount, were made by the defendant as the consideration-money of a lot, in, &c., and for no other consideration; that at the time of the purchase and of the execution of the writing obligatory, the plaintiff agreed to convey the lot to him upon the payment of the purchase-money, as specified in said several writings obligatory; that all said notes had been paid except the one sued on, before the commencement of the suit. Averment, that before the commencement of the suit the plaintiff did not convey, nor execute a conveyance or tender it upon full payment of the purchase-money or on any other condition. *Held*, that the plea was valid in bar of the action.

Monday, December 12.

ERROR to the *Tippecanoe* Court of Common Pleas.

Roache, J.—Debt by the plaintiff below on a writing obligatory.

Nov. Term, 1853.

SMITH v. THE STATE.

The defendant below filed a plea alleging that the writing obligatory sued on, with three others of like amount, were made by him as the consideration-money of a lot in *Lafayette*, and for no other consideration. That at the time of the purchase and of the execution of the writing obligatory, the plaintiff below agreed to convey the lot to him upon the payment of the purchase-money, as specified in the said several writings obligatory. That all said notes had been paid, except the one now sued on, before the commencement of this suit. Averment, that before the commencement of the suit the plaintiff did not convey, nor did he execute a conveyance and tender it upon the full payment of the purchase-money, or on any other condition.

To this plea, the Court sustained a demurrer, and rendered final judgment for the plaintiff for the amount due on the writing obligatory.

This plea is precisely similar to that in the case of *Ellis* v. *Hubbard*, decided by this Court at the *May* term. 1853, (1) and no new or different question arises upon it. The plea was a good bar, and the demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Jones, for the plaintiff.

J. A. Wilstach, for the defendant.

(1) *Ante*, p. 206.

SMITH *v.* THE STATE.

The act of *January* 16, 1849, giving exclusive original jurisdiction of assaults and batteries to justices of the peace in *Delaware* county, took effect from its passage.

Nov. Term, 1853.

DURHAM v. HUDSON.

Monday, December 12.

ERROR to the *Delaware* Circuit Court.

ROACHE, J.—Indictment for assault and battery. The indictment was found at the *March* term, 1849, and was continued to the *September* term. At the latter term, the defendant moved to quash, on the ground that the Court had no jurisdiction. Trial. Verdict and judgment against the defendant.

The motion to quash should have been sustained. The act of *January* 16, 1849, giving exclusive original jurisdiction of assault and battery to justices of the peace in *Delaware* county, took effect from its passage. At the time the motion to quash was made, and at the trial, the Circuit Court had not jurisdiction of the offence. *Sprigs* v. *The State*, 2 Ind. R. 75.—*The State* v. *Lackey*, *id.* 265.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. March, for the plaintiff.

W. Garver and *R. A. Riley*, for the state.

DURHAM, Administrator, *v.* HUDSON, Administrator.

Action for money had and received. Pleas, payment and the statute of limitations. Replication to the latter plea, that the cause of action had been concealed, &c. *Held*, that the receipt of the money was admitted. *Held*, also, that the bar of the statute of limitations was admitted, and the question simply presented whether there had been a concealment which would take the case out of the statute.

In an action by an administrator to recover a debt due to the intestate, the declaration concluded "to the damage of the plaintiff, administrator as aforesaid," &c. No objection was made to the declaration in the Circuit Court, the counts showed plainly enough that the plaintiff was suing as administrator, and the judgment was rendered in the proper form. *Held*, that the judgment ought not to be disturbed.

The defendant, against whom a verdict was rendered, was present in person and by counsel, at the impanneling of the jury and at the trial, and upon a motion made by him to set aside the verdict and grant a new

Nov. Term, 1853.

DURHAM v. HUDSON.

trial, no objection was made to the cause having been tried by an improper number of jurors. *Held*, that he could not, therefore, object, on error, that the cause was tried by eleven instead of twelve jurors.

In a civil case, the objection that a cause was tried by less than the competent number of jurors, will be held to be waived, as against the party who consented thereto.

The record of a cause stated that the jury that tried it was composed of twelve persons, but in enumerating the names, upon the assumption that each juror's christian name was intended to be prefixed, only eleven were mentioned. *Held*, that the presumption still was that the jury was composed of twelve persons.

Monday, December 12.

ERROR to the *Vigo* Probate Court.

PERKINS, J.—Assumpsit by *Hudson*, administrator of *John L. Walker*, deceased, against *Durham*, administrator of *William Walker*, deceased.

The declaration contains four counts. The first charges that at, &c., on, &c., in 1818, *William Walker*, deceased, received in *Pennsylvania* money belonging to said *John L. Walker*, deceased, which he had not paid over, &c., "to the damage of the said plaintiff, administrator as aforesaid," &c.

The second count charges that *Durham* was indebted to the plaintiff for money had and received by *William Walker* in his lifetime, &c.; and concludes "to the damage of said plaintiff as administrator aforesaid," &c.

The third count charges that *William Walker*, in his lifetime, was indebted to *John L. Walker*, in his lifetime, and alleges a promise of payment by *William* to *John* in the lifetime of both, a failure to comply with said promise, and also a failure by his administrator, since the death of said *William*, to pay, and concludes to the damage of "said plaintiff, administrator as aforesaid."

The fourth count is like the third.

The defendant pleaded payment and the statute of limitations.

Replications—to the first plea, denial of payment, and to the second, that the deceased, *William Walker*, concealed the fact that he had received the money, &c., and that since his death, his administrator had also concealed the fact. Rejoinder to the last replication, denying the con-

cealment. Issues. And, says the record, "to try the issues herein, a jury is called as follows: *John Crews, James S. Freeman, Alexander Conner, George H. Spencer, J. Gurthwait, Jesse McGath, Bebee Booth, David Rankin, Samuel R. Mann, H. H. Hager, A. Freehart*, twelve good and lawful men, householders or freeholders of our said county, who being elected, tried and sworn," &c.

The verdict was for the plaintiff, and the defendant interposed a motion for a new trial, as follows:

"The defendant moves the Court for a new trial for the following reasons:

"1. The Court erred in admitting evidence at the instance of the plaintiff.

"2. The jury took with them papers which had not been proved and given in evidence before them.

"3. The verdict is contrary to the evidence and the law."

The Court overruled the motion, and rendered judgment on the verdict.

By the pleadings, the reception of the money by *William Walker* was admitted, and the plea of payment was not proved.

By the pleadings, the bar of the statute of limitations was admitted, and the question made upon the concealment of the cause of action which might take the case out of the statute.

This was a question for the jury, and was decided by them upon the evidence. Their decision was not so clearly wrong as to authorize us to disturb it on the proofs.

It is urged that the declaration is bad, because some of the counts do not conclude to the damage of the plaintiff "as" administrator, but conclude "to the damage of the plaintiff administrator as aforesaid," omitting the "as" before the word administrator.

No objection was made to this declaration in the Court below. The counts all show plainly enough that the plaintiff was suing as administrator, and the proper judgment was rendered. We shall not disturb the judgment on this ground.

Nov. Term, 1853.

KITCHEN v. COFFYN.

It is also objected that the record shows a trial by a jury of eleven instead of twelve men.

The defendant and his counsel were present at the impannelling of the jury, and accepted it. They were present during the trial and made no objection; and in their motion for setting aside the verdict and granting a new trial, the defect in the jury was not mentioned. If, therefore, there were but eleven jurors, it would seem clear that the defendant had consented to that number; and his consent, at least in a civil case, would cure the error.

But we do not know that there were not twelve jurors. The record says there were twelve, and gives a number of names as composing the twelve. The clerk may, in making up the record, accidentally have omitted one, and he may not. More than twelve names are given, and unless every man must be presumed to have at least two names, there may be twelve men named in the record as jurors. We do not know that such a presumption would be allowed to prevail against the positive statement in the record, and think it should not. *Bebee* may be one man and *Booth* may be another.

An immaterial point is made in regard to the admission of evidence.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. P. Usher, for the plaintiff.

A. Kinney, for the defendant.

KITCHEN and Wife *v.* COFFYN.

A. being the owner of a tract of land under mortgage, agreed, by title bonds, to convey a part of it to *B.* and the residue to *C.*, with the agreement that *C.*, with the consent of the mortgagee, might apply the purchase-money to the discharge of the mortgage on his part. The mortgagee having assented, *B.*, with the fraudulent purpose of getting his part of the land also released from the mortgage, as a part of the land purchased by *C.*, arranged with *A.* and *C.* that *A.* should convey the entire tract to *C.*, that *C.*, upon paying the purchase-money for his part of the

premises, should fraudulently procure a release by the mortgagee of the whole of the premises, and then convey to *B.* the part of the premises which *A.* had agreed to convey to him. *C.* having fraudulently procured the release of the whole premises upon the payment to the mortgagee of the purchase-money for his part, and having refused to convey to *B.* as he had agreed, *B.* filed his bill for a specific performance. *Held*, that the bill would not lie.

Monday, December 12.

APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—Bill in chancery to obtain an injunction restraining proceedings in an ejectment suit, and to obtain a conveyance of land. Decree below for the plaintiff.

The bill states that one *Elisha Stout* was the owner of a certain tract of land; that said land was mortgaged to *Carlisle*, of *Cincinnati*, *Ohio*, for a fraction less than 2,100 dollars; that said *Stout* sold a certain parcel of said mortgaged premises to said *Coffyn*, receiving therefor the full consideration; that he sold a certain other parcel of said mortgaged premises to *Kitchen*, one of the defendants to the bill, for the consideration of 1,800 dollars, which sum *Kitchen* was to pay to *Carlisle* on his mortgage, said *Carlisle* agreeing, on said sum being paid, to release the portion of the premises purchased by *Kitchen* from the operation of the mortgage. We will now quote from the bill:

"Your orator further shows unto your honors that some short time after the making of said title-bond as last aforesaid, said *Kitchen* made an arrangement with said *Carlisle*, in relation to said mortgage given by said *Stout* to him, said *Carlisle*, the precise terms and stipulations of which are unknown to your orator, by which it was agreed by and between said *Kitchen* and said *Carlisle*, that said *Carlisle* would release his said mortgage from so much of said mortgaged premises as said *Stout* had sold and was about to convey to said *Kitchen*, so as to enable said *Stout* and wife to convey the same to said *Kitchen* free and clear from all incumbrance; and the said *Stout* being also desirous to convey to your orator said tract [purchased by him of said *Stout* as above stated] free and clear of all incumbrance, and the same being also in-

Nov. Term, 1853.

KITCHEN v. COFFYN.

cluded in the premises mortgaged to said *Carlisle* as aforesaid, and your orator being also desirous to receive such title from said *Stout* and wife, it was therefore agreed by and between said *Kitchen*, *Stout*, and your orator, that said *Stout* and wife should convey the tract sold by said *Stout* to your orator, to said *Kitchen*, together with and in the same deed of conveyance and with said tract so sold to said *Kitchen* as aforesaid, for the purpose of having said tract (that sold to your orator as aforesaid by said *Stout*) also released from said mortgage, and that said *Kitchen* and wife should then immediately re-convey the same to your orator." The bill proceeds to aver, that to carry out the arrangement, *Stout* did convey the land sold to *Coffyn*, as well as that sold to *Kitchen*, to said *Kitchen*, and that *Kitchen* got it all released from the mortgage mentioned, but that he then refused to convey to said *Coffyn*, &c. Without extending the statement, we may say that it appears from the whole bill that the ground of complaint, and the manner in which it arose, are as follows: *Carlisle* had a mortgage of over 2,000 dollars on land of *Stout*. *Coffyn* purchased and paid for a certain portion of that land. *Kitchen* purchased, for 1,800 dollars, a certain other portion of it, but before paying for it, arranged that the purchase-money should go to *Carlisle*, he releasing the premises purchased by said *Kitchen* from the mortgage. The idea occurred to *Coffyn* that it would be wise in him to get his purchase also released; and to accomplish it, he arranged with *Kitchen* and *Stout* that it should be conveyed to *Kitchen* in the same deed that conveyed the part purchased by him, and apparently as composing a part of said *Kitchen's* purchase, so that he might, without paying any additional consideration to *Carlisle*, and by an imposition upon him, get it all released from the mortgage, thus depriving *Carlisle* of his security for the balance left unpaid on his mortgage debt, and giving *Coffyn* a clear title through *Kitchen;* that all this being accomplished, except the conveyance from *Kitchen* to *Coffyn*, said *Kitchen* now refuses to execute the convey-

ance to said *Coffyn* as stipulated, and, hence, the aid of a court of equity is invoked to compel him to do it.

The bill was demurred to below, and the demurrer was overruled.

It is a well settled rule that to entitle a party to the aid of a Court of conscience, he must enter that Court with clean hands, so far as relates to the particular case which he presents to the Court, and in which he prays for aid. In *Creath's* administrator v. *Sims*, 5 How. (U. S.) R. 192, it is said—"The complainant alleges that the obligation to which he had voluntarily became a party, was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfillment. This prayer, too, is preferred to a Court of conscience—to a Court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this: that, however unworthy may have been the conduct of your opponent, you are confessedly in *pari delicto;* you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you."

So, in the case before us, *Coffyn* has hazarded his property in a scheme to defraud *Carlisle*, and he must escape from the hazard as best he can, without the aid of a Court of Chancery.

The demurrer to the bill should have been sustained, and the bill dismissed. (1)

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

A. Davison, for the appellants.

J. S. Scobey, for the appellee.

(1) Davison, J., having been concerned as counsel, was absent.

Nov. Term, 1853.

Doe v. Goodwin.

The State v. Nolan.

Courts of Common Pleas have not jurisdiction, under the R. S. 1852, over offences committed before the act establishing said courts took effect.

Monday, December 12.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Stuart, J.—It appears that the assault and battery complained of was committed two months prior to the taking effect of the act to establish Common Pleas. The Court, on motion, correctly dismissed the complaint for want of jurisdiction. Section 3, c. 92, vol. 1, R. S. 1852.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

J. O'Brian and *R. W. Sill*, for the appellee.

The State v. Sherm.—The State v. Young.

Monday, December 12.

APPEALS from the *Tippecanoe* Court of Common Pleas.

Per Curiam.—The above opinion in the case of *The State* v. *Nolan*, is applicable to these cases, and the judgments are therefore affirmed.

L. Reilly, for the state.

J. O'Brian and *R. W. Sill*, for the defendants.

Doe on the demise of Wentworth and Another v. Goodwin.

The finding of the Circuit Court, sitting as a jury, upon a matter of fact, will not be disturbed, where the evidence is conflicting.

Nov. Term, 1853.

Doe v. Goodwin.

Monday, December 12.

ERROR to the *Henry* Circuit Court.

Stuart, J.—Ejectment for the undivided half of a half lot in *Newcastle*. The evidence is all made part of the record. Trial by the Court. Finding and judgment for *Goodwin*.

The lessors of the plaintiff claimed title under a judgment in their favor against *Richard Goodwin*, execution, sale and sheriff's deed. The series of these events stand thus: Judgment, *October* 31, 1848. Execution, *November* 1, 1848. Levy, *July* 9, 1849. *Richard Goodwin*, execution-defendant, died *December* 3, 1848, after issue and before levy. The property was sold *August* 4, 1849.

The evidence shows that *Wesley Goodwin* conveyed the whole of the half lot to *Richard Goodwin* by deed dated *November* 4, 1845. In *October*, 1846, *Richard* mortgaged the same half lot to *Wesley*, to secure the payment of a note. In *March*, 1848, *Richard* conveyed the undivided half of the half lot to *Wesley* in fee, and *Wesley* entered a release of the mortgage as to the undivided half of the half lot—acknowledging the receipt of half the amount due thereon. On the 31st day of *October*, the very day on which the judgment was rendered, *Richard* conveyed the remaining undivided half of the half lot to *Wesley* in fee.

The chief point of controversy is, which event transpired first, the rendition of the judgment or the delivery of the deed. There is considerable conflicting evidence as to the exact hour. But this being a matter of fact, proper for a jury to determine, and the Court sitting as a jury having found in favor of the priority of the deed, we do not feel at liberty to disturb the finding. In this we but adhere to the course repeatedly announced and acted upon in this Court.

There is another point made by counsel in argument, but as the decision of it could not affect the result, we do not regard it as fairly arising in the record.

Per Curiam.—The judgment is affirmed with costs.

M. L. Bundy, *W. Henderson* and *J. S. Newman*, for the plaintiff.

J. Rariden and *C. H. Test*, for the defendant.

Nov. Term, 1853.

Jelly v. Stevens.

Jelly *v.* Stevens, Administrator.

The declaration in a suit brought by a foreign administrator, need not, under the R. S. 1843, state that the plaintiff produces and files, &c., a copy of his letters, &c.

The statute requiring the production and filing, &c., by such administrator of a copy of his letters, applies only to the rules of evidence and not to those of pleading.

Suit upon a note payable nine months after date. Averment, that "although said sum of money has been long since due and payable," yet, &c. *Held*, that it sufficiently appeared that nine months had elapsed from the date of the note.

In a suit by an administrator upon a promissory note given to the intestate, a breach in the declaration that the same is wholly due and unpaid, is a sufficient denial of its payment to the intestate.

Monday, December 12.

APPEAL from the *Ohio* Circuit Court.

Davison, J.—Assumpsit by the appellee against the appellant on two promissory notes, one payable nine months after date, the other in the form of a common due bill. There was a general demurrer to the declaration overruled, and judgment given for the plaintiff below.

Three objections are raised to the declaration:

1. That the appellant, being a foreign administrator, the declaration should have alleged that he had produced and filed in the Court in which the suit was brought, a copy of his letters of administration, duly authenticated, &c. In reference to this point there is a statutory provision which enacts that "a non-resident administrator," &c., "duly appointed in any other state," &c., "may commence and prosecute a suit in any Court of this state in his capacity of administrator", &c.; "and a copy of his letters, duly authenticated," &c., "being produced and filed in the Court in which suit is brought, shall be sufficient evidence of his due appointment." R. S. 1843, c. 30, s. 463. By the declaration, it is alleged that the plaintiff brings into Court the letters, &c., granted to him by the proper Court in the county of *Boone*, in the state of *Kentucky*, &c. But it is contended that this allegation does not meet the requirements of the statute. The declaration is in the

usual form. We think it need not state that the letters of administration were produced and filed, &c. The statute, it seems to us, was intended to affect only the rules of evidence in such cases, and not those of pleading. Had the appellee's appointment as administrator been contested by plea to the action, then the letters would not have been evidence of that fact without being produced and filed in the Court in which the suit was brought. But the act, in our opinion, does not require that such production and filing should appear in the declaration.

Another ground taken in support of the demurrer is, that there is no averment of the period of nine months from the date of the note having elapsed. The averment is in these words—"Although the said sums of money have been long since due and payable," &c. There is nothing in this objection. The allegation is sufficiently direct and certain. The fact that the note was due and payable could not exist unless the period of nine months from its date had passed.

The last objection assumes that the breach is insufficient—that it does not aver non-payment to the intestate in his lifetime. The breach assigned is this, viz., "The said defendant has not, although often requested to do so, paid the said sums of money or any part thereof," &c.; "and the same is wholly due and unpaid," &c. This breach is, no doubt, properly stated. The averment that the note was unpaid, is a sufficient denial of its payment to the intestate.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

D. S. Major and *A. Brower*, for the appellant.

J. W. Spencer, for the appellee.

Nov. Term, 1853.

CRAVENS v. KISER.

CRAVENS *v.* KISER.

Where land is sold by metes and bounds, and is estimated to contain a specific quantity, or is for such quantity "more or less," and a gross sum is paid for the entire tract, the general rule is that the vendee will not be entitled to an abatement in price should the number of acres fall short of the estimated quantity.

This rule is not, however, applicable where there is any fraud or concealment on the part of the vendor.

Where, through the fraud of the vendor, the purchaser gets less than the estimated number of acres, the sum to be deducted by reason thereof is the value of the deficiency.

Monpas, December 12.

APPEAL from the *Ripley* Circuit Court.

DAVISON, J.—*Cravens* sued *Kiser* in assumpsit on two promissory notes, each for 93 dollars. The notes were payable to one *William S. Wilson* and by him assigned to the plaintiff. The defendant pleaded the general issue and four special pleas, upon which issues were made. Under the issues, the defence set up was, first, that the consideration of the notes had failed; second, that they were obtained from the defendant by *Wilson* by fraud, &c. Verdict for the defendant. Motion for a new trial overruled, and judgment on the verdict.

By the evidence it appears that in *July*, 1846, the defendant purchased of said *Wilson* a tract of land in *Ripley* county, and also personal goods valued at 150 dollars, for the whole of which he agreed to pay him one thousand, three hundred and fifty five-franc pieces, viz: fifty in hand; one thousand when a deed for the land was made; and the residue in three equal annual instalments. Just before the sale, the vendor represented to the defendant that the tract contained one hundred and forty acres: he said there might be five acres more or less. To this the defendant replied that he cared nothing for five acres. When the parties met to close the contract, a deed was drawn up which merely designated the boundaries of the land, without setting out any number of acres. The defendant insisted that the deed should call for one hundred

and forty acres. *Wilson*, in reply, said, he never would agree to have any number of acres specified in the deed; that the consideration agreed on was his price for the land. If the tract contained only half that number of acres, he would take no less for it. Thereupon the parties agreed to insert in the deed, immediately after the description of the land, these words: "supposed to contain one hundred and forty acres, be the same more or less." The deed was accordingly executed. The defendant paid *Wilson* one thousand five-franc pieces, and gave him three promissory notes, each for 93 dollars, and due respectively in one, two and three years. The last two are the notes sued on. It was proved that *Wilson* originally owned in one tract two hundred and seventy acres, out of which he had conveyed to divers persons one hundred and sixty-nine acres. The residue constituted the entire tract sold to the defendant. Upon actual survey, the land conveyed to him was found to be one hundred and four acres and eighty-seven hundredths. When it was conveyed to the defendant, it was believed to be worth 10 dollars an acre.

The Court, at the instance of the defendant, instructed the jury that, "In determining whether the consideration of the notes has failed, they should look to the contract in which they were given, and though one hundred and four acres may be worth all that *Kiser* agreed to pay for one hundred and forty acres, still if *Wilson* practiced a fraud on *Kiser*, and by reason thereof he did not get the quantity of land he was entitled to under his contract, the sum to be deducted is a sum equal to the value of the deficiency."

The general rule is, that where land is sold by metes and bounds, and estimated to contain a specific quantity, or for "more or less," and a gross sum is paid for the entire tract, the vendee will not be entitled to an abatement in price, should the number of acres fall short of the estimated quantity. But this rule is not applicable where there is any fraud or concealment on the part of the vendor. It is true the deficit in quantity might be so great

Nov. Term, 1853.

CRAVENS v. KISER.

as to authorize the inference that the seller acted in bad faith; still such abatement must proceed on the ground of his fraudulent conduct.

It has been said that, "if through fraud or palpable mistake, more or less land should be conveyed than was in contemplation of the vendor to part with, or the purchaser to receive, the injured party will be entitled to relief." *Young* v. *Craig*, 2 Bibb 270. In the case before us, the jury were authorized to infer from the evidence that *Wilson*, when he represented the tract to contain one hundred and forty acres, must have known his representation to be incorrect. It is insisted that what he said when the deed was made, viz., "that he would take no less for the tract if it did not contain half that number of acres," was sufficient to put the defendant upon inquiry, and indicated an intention not to mislead him. Fraud often lurks under just such expressions. The words used by the vendor were not a proper disclosure of what he in reality did know relative to the quantity of land. He was, therefore, guilty both of misrepresentation and concealment. And, moreover, he consented that the deed should be made to correspond, in effect, with his previous representations. We think it was sufficiently proved that *Wilson* intentionally misrepresented the number of acres constituting the tract.

But it remains to be considered whether the Court instructed the jury correctly. It is contended that the land in question, at the time of the sale, was in value equal to the sum agreed to be paid for it, and that, therefore, it should not be said that the consideration had failed. That position might be sustained, had the transaction been untainted: under the circumstances of this case it is not tenable. The price agreed on by the parties must be considered the actual value of the premises when they were purchased.

The law extends no favor to a fraudulent party. Whatever consequences follow his want of good faith, should rest upon his own head. The defendant was entitled to the full benefit of his contract; to an allowance com-

mensurate with the injury resulting from the fraud practiced upon him. By misrepresentation he was induced to believe that the tract contained one hundred and forty acres, when, upon actual survey, a deficiency of at least thirty-four acres was shown. It follows that an amount equal to the value of the deficit should be deducted from the notes. The jury, in our opinion, were properly instructed.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the appellant.

E. Dumont and *I. W. Robinson*, for the appellee.

THE STATE *v.* PHIPPS.

The backing of water over a public highway to the injury and annoyance of the public, by the erection of a mill-dam, is a common nuisance.

An indictment will lie for maintaining such a nuisance.

To an indictment for maintaining such nuisance, it is no defence, under the R. S. 1843, that the defendant may have acquired a right, by virtue of a writ of *ad quod damnum*, to the use of the land of individuals on which the highway runs, for the purpose of flowing the water upon the land.

Neither is a prescription from a twenty years' continuance of the nuisance, a defence.

Friday, December 16.

ERROR to the *Owen* Circuit Court.

ROACHE, J.—Indictment against the defendant for erecting and maintaining a public and common nuisance. The charge is, that the defendant built a mill-dam across *Rattle-Snake* creek, in the county of *Owen*, and thereby overflowed a public highway, whereby the latter was obstructed, to the great damage, injury, and common and public nuisance, &c.

The Circuit Court quashed the indictment.

That such an obstruction of a public highway is a common nuisance there can be no question. 1 Hawk. P. C.

Nov. Term, 1853.

SWAILS v. THE STATE.

—4 Blacks. Com. 167.—*The State* v. *Miskimmons*, 2 Ind. R. 440.

The fact that the defendant may have had his writ of *ad quod damnum*, and acquired a right to the use of the land of individuals for the purpose of flowing the water upon it, is no defence to the indictment. See R. S. 1843, p. 974, s. 66. Nor would even a prescription from a twenty years' continuance of the nuisance be of any avail to him. *Mills* v. *Hall*, 9 Wend. 315.

For such a nuisance, the party is liable to be indicted. See *The State* v. *Virt*, 3 Ind. R. 447.

The defendant has not thought proper to inform us by a brief what are the grounds of his objection to the indictment—the points embraced in this opinion being those discussed by the counsel for the state.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

SWAILS *v.* THE STATE.

To sustain an action for forcible entry and detainer, it is not necessary to show a legal title to the property, a peaceable possession when the wrong was committed being sufficient.

4 516
161 380

Proof that a person is acting notoriously as a public officer, and is generally recognized as such, is *prima facie* evidence of his official character.

School districts being public corporations, organized under a public statute, the courts will judicially take notice of their organization.

Trustees of a school district, appointed by the township clerk, held their office, under the R. S. 1843, until their successors were elected and qualified.

Friday, December 16.

ERROR to the *Decatur* Circuit Court.

ROACHE, J.—Indictment against *Swails* for the forcible entry and detainer of a school-house, the property of a common-school district. Plea, not guilty. The issue was found for the state, and the defendant was fined.

It was proved upon the trial that *George McLaughlin*, *Zenas Darnall* and *William Butcher*, acting in the capacity of trustees of the district, had employed one *Simpson Darnall* to teach in the school-house of the district mentioned in the indictment; that said *Simpson Darnall*, on the morning school was to commence, repaired to the school-house; and that the defendant was standing in the door of the house, with a stick or cane in his hand, using loud and threatening language, and declaring that the teacher should not enter. After the latter had gone away, the defendant nailed up the doors of the school-house and left it.

During the trial, the prosecuting attorney offered to prove by parol testimony, that said township was a corporation, legally organized, and had been so recognized by the public for many years; and that said *McLaughlin*, *Zenas Darnall* and *Butcher* were acting as trustees of said school-district, to which the defendant objected, on the ground that there was a record of those facts, which was better evidence.

The Court overruled the objection, and permitted the testimony to go to the jury.

Upon cross-examination it appeared that said trustees had been appointed by the township clerk many years before; that notice for the election of trustees had been given several times; but that no election was held.

The defendant below requested the Court to instruct the jury to the effect that the state was bound to prove that the school-house belonged to the district, and that said school-district was organized as a corporation, by the records, unless the absence of the records was duly accounted for; and that district trustees, appointed by the township clerk, could only hold their offices until the next annual election for trustees. These instructions the Court refused to give.

It is urged that the Court erred in admitting the parol evidence objected to, and in refusing to give the instructions asked for.

We think the parol evidence was competent. It was

Nov. Term, 1853.

SWAILS v. THE STATE.

not necessary for the state to show a legal title to the school-house in the district. To sustain the charge, it was sufficient to prove they were in peaceable possession. This could be properly done by parol.

Such evidence was also competent to establish the official character of the district trustees. The trustees, within their respective districts, are public officers. Proof that an individual has acted notoriously as a public officer, known to the laws, and has been generally recognized as such, is *prima facie* evidence of such official character, until rebutted by the defendant. 1 Greenl. Ev. ss. 83, 92.

Nor was it necessary that the organization of the district should have been established by the production of the records.

School districts are not mere private, but public or municipal corporations. Their organization is provided for by a public statute, of which the courts will judicially take notice. *Portsmouth Livery Company* v. *Watson*, 10 Mass. 91.

All that it was necessary for the state to prove was, that the officers required by the statute creating the corporation, were acting in the discharge of the duties imposed by its provisions.

The public law creates the school-district a corporation. Its organization is perfected by the election or appointment of three trustees, who are vested with powers to transact all its business. R. S. 1843, c. 15, ss. 41, 42. The only organization, under the statute, is the election or appointment of the trustees. Proof that such officers were acting in discharge of the duties required by the statute, is sufficient *prima facie* evidence of the organization.

The defendant insists, however, that *McLaughlin*, *Zenas Darnall* and *Butcher* were not legally the trustees of the district, for the reason that having been appointed by the township clerk several years previously, their terms of office expired at the first annual election after their appointment. In this he is mistaken. Sec. 51, c. 15, provides, that in case of a vacancy, the township clerk shall fill it by appointment. Section 52 enacts that such ap-

pointee shall hold for the residue of the term of the trustee whose place he fills, and until his successor is qualified. Section 53 provides that when the district fails to elect at the first election, the clerk shall appoint the three trustees, and designate the term of each, so that one shall retire annually, according to the rule established in section 43. The latter section relates to the election by the voters of the district, and provides that the trustees elected shall hold their offices for one, two, and three years, respectively, according to the number of votes received by each, and until a successor is qualified. It is immaterial, then, whether the trustees in the present case were appointed by the township clerk to fill vacancies, or in default of an election by the voters of the district. In either instance, they held the office until displaced by successors elected by the people, and qualified. (1)

Per Curiam.—The judgment is affirmed with costs.

J. Robinson, for the plaintiff.

J. S. Scobey, for the state.

(1) DAVISON, J., having been concerned as counsel, was absent.

STEVENSON and wife *v.* DRULEY.

To aid courts in interpreting wills, the law permits, in every case in which it may be necessary, that parol evidence may be given of the circumstances of the testator, and of his family and affairs, in order that the Court, standing, as it were, in the situation of the testator when making his will, may, with greater certainty, arrive at his intention in giving a construction to the language employed by him to express it.

A testator having a son and grandson, his only presumptive heirs, devised a part of his real estate to the grandson, as follows: I will and bequeath to *A. B.* the following described real estate (describing it)—the said *A.*

Nov. Term, 1853.

STEVENSON v. DEULEY.

B. to have possession of the same, except the widow's dower, by his paying said widow one-fourth part for rent until he becomes of age, and no longer. In disseizin by the heir of the son against the heirs of *A. B.* for the land, evidence was admitted tending to show that the property mentioned in and disposed of by the will, was all the testator owned; that he had previously conveyed to his said son, to whom by his will he gave 5 dollars, adding that he had received his part before, a quantity of land worth as much if not more than that given to *A. B.* *Held*, in the light of this evidence, that the testator intended to give *A. B.* a fee-simple.

In doubtful cases the law of inheritance prevails against the terms of the will.

Friday, December 16.

ERROR to the *Wayne* Circuit Court

PERKINS, J.—Disseizin. Judgment below for the defendant.

Jacob Kesling, of *Wayne* county, *Indiana*, made the following will and died:

"Know all men by these presents that I, *Jacob Kesling*, of the county of *Wayne* and state of *Indiana*, being weak in body, but perfect in mind and memory, do make and constitute this my last will and testament, in manner and form following, to-wit:

"1. To pay all my just debts and funeral expenses out of my estate, by my hereafter named executors.

"2. It is my will that my beloved wife, *Mary*, have one-third of all my real estate during her lifetime. I will and bequeath to my wife one stove and my cattle; the balance of my household property, furniture and farming utensils to be sold by my executors and equally divided between my wife and *Jacob W. Fisher*, my grandson, excepting my clock, my horse, or the price of him, which is fifty dollars, and gears, which I will to *Jacob W. Fisher*.

"It is my will that my house and lot in *Richmond* be sold by my executors and the money on hand to be divided as follows: one-half to *Jacob W. Fisher*, the other half equally divided between my wife and my son, *Jesse Kesling's*, children, if he shall have any, when they become of lawful age; and if not, to be equally divided amongst my widow's children.

"I will and bequeath to *Jacob W. Fisher* the following discribed lot of land, to-wit: eighty acres of land lying

and being in the county of *Wayne* and state of *Indiana*, and being a part of the north-west quarter of section thirty-five, town thirteen; the said *Jacob W. Fisher* to have possession of, except the widow's dower, by his paying said widow one-fourth part for rent until he becomes of age, and no longer; all which I leave to the sound judgment and discretion of my hereafter-named executors.

"I also will and bequeath to my son, *Jesse Kesling*, five dollars, he having had his part heretofore.

"I also constitute and appoint my friends, *William Fouts* and *Daniel Clark*, my executors to this my last will and testament, revoking all former wills by me made, this the 19th day of *February*, 1829."

The subject of controversy in this suit is the land discribed in the clause of said will reading thus: "I will and bequeath to *Jacob W. Fisher* the following described lot of land, to-wit, eighty acres of land lying and being in the county of *Wayne* and state of *Indiana*, and being a part of the north-west quarter of section thirty-five, town thirteen; the said *Jacob W. Fisher* to have possession of, except the widow's dower, by his paying said widow one-fourth part for rent until he becomes of age, and no longer."

Jacob W. Fisher, assuming that he had a fee-simple in said land under the will, conveyed the same by deed in fee to *William Druley*, the defendant, and died.

Weakly Stevenson, the male plaintiff, married *Ann Maria Kesling*, only child of *Jesse Kesling*, the female plaintiff, and they now bring this suit, asserting that *Jacob W. Fisher* took but a life-estate under the will, and that, hence, upon his death, said *Ann Maria*, the sole heir of the *Kesling* line, became entitled to the same by inheritance.

The only question in the case is upon the construction of the will.

To aid courts in interpreting wills, the law permits, in every case where it may be necessary, that parol evidence may be given of the circumstances of the testator, and

Nov. Term, 1853.

Bush v. Seaton.

of his family and affairs, in order that the Court, standing, as it were, in the situation of the testator when making his will, may, with more certainty, arrive at his intention, in giving a construction to the language he may have used to express it. Wigram on the admission of Extrinsic Evidence, 51.

Accordingly, in this case, the Court below permitted the defendant to give such evidence, tending to show that the property mentioned in, and disposed of by, the will was all the property said testator owned; that he had previously conveyed to his son *Jesse*, to whom, by the will, he gives 5 dollars, adding that he has had his part before, a quantity of land equal to, if not exceeding in value, that given to *Jacob W. Fisher*, the only other and equal presumptive heir of said testator, at the time, &c.; and the question is presented in the light of this evidence, does the will clearly give to *Jacob W. Fisher* a fee-simple in the land in controversy? for, in doubtful cases, the heir prevails against the terms of the will.

We think it plain enough that the testator intended to give a fee-simple.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman and *J. P. Siddall*, for the plaintiffs.

J. Perry and *O. P. Morton*, for the defendant.

---

4 522
134 348

Bush *v.* Seaton and Another.

Possession of a promissory note, not indorsed, is *prima facie* evidence of ownership, and *prima facie* entitles the possessor to payment.

Where the payee of a note, having transferred it to another person by delivery, afterwards receives payment of the note, the equitable owner may recover from him the money, in an action for money had and received.

The admissibility of evidence need not be examined, where, without regard to it, the other evidence fully sustains the judgment.

APPEAL from the *Fayette* Circuit Court.

Perkins, J.—Assumpsit for money had and received, &c., by *Seaton* and *Holman* against *Bush*. Plea, the general issue. Trial by the Court without a jury, and judgment for the plaintiff.

It appears that *Seaton* and *Holman* were in possession of a note given by *Jabez Harrison* to *Joshua Bush*, which note was without an assignment by indorsement thereon from *Bush;* that *Harrison*, who, as did *Bush*, resided in *Fayette* county, died; that an administrator, in that county, was appointed upon his estate; that *Seaton* and *Holman*, who lived out of that county, enclosed said note to the clerk's office of *Fayette* county, to be filed as a claim against said estate; that the estate was settled up, the debts paid, and no one being present at the time to receive the money on this note, it was placed in the clerk's office, as allowed to *Bush*, he being the payee. *Bush* never had pretended to have any claim against the estate of *Harrison;* but learning that this money was lying in the clerk's office, as above stated, he came in and obtained it from the clerk. This suit was instituted to recover it back, and sustained below.

The action for money had and received, being an equitable one, will lie in a case like the present.

The question is, were *Seaton* and *Holman* bound to prove that *Bush* had actually sold the note, it not being indorsed by him? We think not. Possession was *prima facie* evidence of ownership, and *prima facie* entitled the possessors to the money on the note. In this case, the *prima facie* claim of the plaintiffs is strengthened by the circumstance that *Bush* never set up any pretence, during the whole period the estate was undergoing settlement, to a demand against it.

We think, on the facts above stated, the judgment below was right.

It may be remarked, that *Seaton* and *Holman* were not the first purchasers of the note from *Bush*, and that it was proved by that purchaser that *Bush* did sell and receive full pay for the note; and the manner, all regular,

Nov. Term, 1853.

BARAMORE v. THE STATE.

in which it passed to *Seaton* and *Holman*, was shown; but the evidence was objected to on the ground of interest.

As the evidence was not necessary to justify the judgment given, it is unimportant whether it was correctly admitted or not; and, hence, we shall decide nothing on the point of its admissibility.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

S. W. Parker, for the appellant.

J. A. Fay and *C. H. Test*, for the appellees.

BARAMORE *v.* THE STATE.

Where a defendant has been convicted of larceny on information filed under the R. S. 1852, without any affidavit or other sworn charge, the judgment, on motion, will be arrested.

Friday, December 16.

APPEAL from the *Shelby* Court of Common Pleas.

STUART, J.—Trial for larceny on information filed without any affidavit or other sworn charge. Motion in arrest of judgment overruled. This was erroneous. 2 R. S., art. 4, p. 363. The motion in arrest should have been sustained.

Per Curiam.—The judgment is reversed.

R. L. and *T. D. Walpole*, for the appellant.

D. Wallace, for the state.

Nov. Term, 1853.

BLYTHE v. THE STATE.

BLYTHE v. THE STATE.

So much of s. 15 upon p. 3 of vol. 2, R. S. 1852, as requires an attorney at law, in the case of a poor person, to prosecute or defend, upon his appointment by the Court, without fee, is in conflict with s. 21, art. 1, of the constitution of 1851, and void.

4 525
153 378
4 [illegible]
160 [illegible]
4 525
171 641

APPEAL from the *Vanderburgh* Court of Common Pleas. *Friday, December* 16.

STUART, J.—One *Rodgers* stood charged with larceny in the Common Pleas; and the Court being satisfied that the accused was entitled to his defence in *forma pauperis*, assigned *James E. Blythe*, Esq., an attorney of the Court, as counsel to defend *Rodgers*. *Blythe* thereupon denied the right of the state, or of the Court, to demand his professional services without compensation, and thereupon refused to act. For such refusal the Court adjudged him guilty of a contempt, and ordered him to make his fine to the state in the sum of 5 dollars, and stand committed, &c. The facts are all set out in a bill of exceptions—whether strictly regular so as to forbid a disposition of the case without meeting the main question, it is not necessary to inquire.

So much of the 15th sect., p. 30, vol. 2, R. S. 1852, as requires the services of an attorney at law to prosecute or defend without fee, is in conflict with the 21st sect., art. 1, of the constitution, and void.

Blythe's refusal was not a contempt.

Per Curiam.—The judgment is reversed.

Cause remanded, &c.

J. G. Jones, for the appellant.

R. A. Riley, for the state.

Nov. Term, 1853.

Case v. Green.

Case *v.* Green.

Where the substantial matters alleged in a bill for an injunction are positively denied by the answer, the injunction should be dissolved.

Friday, December 16.

APPEAL from the *Switzerland* Circuit Court.

Davison, J.—This was a bill in chancery by the plaintiff against the defendant, to enjoin the execution of a judgment at law. The bill charges that the plaintiff, on the 11th of *March*, 1846, by the earnest solicitation of the defendant, became his surety on a note for 2,500 dollars, payable to *Wesley Smead & Co.*, upon which 1,400 dollars of the principal sum, and all the interest up to the 3d of *September*, 1850, has been paid, leaving a balance due on the 3d of *May*, 1851, of 1,144 dollars. There is a written agreement, signed by the defendant, set out in the bill. It shows that an amicable suit at law, concerning saw-logs, had been entered into by the parties, and that the defendant had stipulated to credit the judgment he might obtain in that suit with the full amount he legally owed on said note. And the plaintiff was to pay the amount so credited to *Smead & Co.* This agreement was delivered to the plaintiff. It is alleged that it, alone, induced him to enter into said suit. The agreement was, on the 14th of *November*, 1850, recorded in the order-book of the *Switzerland* Circuit Court. After this, the defendant, in the same Court and in said amicable suit, recovered a judgment against the plaintiff for 1,030 dollars; but he has failed and refused to enter satisfaction thereon, though the said 1,144 dollars is still due and owing to *Smead & Co.* on said note. That an execution has been issued on said judgment and levied on the plaintiff's property, &c. That the defendant has no real estate in *Indiana;* executions against him have been returned "*nulla bona;*" and he is unable to pay the balance of said note, or any part of it. The bill prays that the defendant be enjoined from proceeding by his execution, &c., and that a decree be rendered in favor of the plaintiff for such amount as

he may be liable to pay *Smead & Co.* on said note; and for general relief, &c.

Upon this bill the associate judges, in vacation, granted an injunction. At the next term of the Circuit Court the defendant filed his answer and moved to dissolve it. The Court sustained the motion.

The answer denies that the delivery of the agreement set out in the bill, constituted the plaintiff's inducement to enter into the amicable suit, but avers that that suit was entered into before said agreement was made or thought of. It alleges that various payments have been made on the note given to *Smead & Co.*, the last of which was on the 3d of *September*, 1850, when the principal of said note, with 6 per centum per annum interest thereon, was fully paid and more than paid. That at the time said judgment was rendered, and even at the date of the agreement, nothing was legally due or owing to *Smead & Co.* on the note.

We think the motion to dissolve the injunction was properly sustained. The averments in the bill upon which it was predicated, are positively denied by the answer. It is denied that the amicable suit was induced by the agreement, and expressly averred that nothing was legally due on the note at the time the judgment was rendered. It follows that the defendant was not bound to enter satisfaction or give any credit on the judgment. The decree must, therefore, be affirmed.

Per Curiam.—The decree is affirmed with costs.

J. Dumont, for the appellant.

J. G. Marshall and *D. Kelso*, for the appellee.

Nov. Term, 1853.

RUST v. THE STATE.

RUST
v.
THE STATE.

A person cannot be punished for the doing of an act, which, at the time of its commission, was not prohibited by law.

The boards of commissioners were authorized by ss. 3 and 4 of the act to regulate taverns and groceries contained in the R. S. 1838, to grant licenses, to continue one year, to retail spirituous liquor.

Those sections are continued in force by section 15 of chapter 59 of the R. S. 1843.

There is no subsequent law in conflict with these sections.

Friday, December 16.

APPEAL from the *Dearborn* Court of Common Pleas.

DAVISON, J.—This was an information for retailing spirituous liquors without license. The information alleges that *Rust*, on the 15th of *March*, 1853, did, in the county of *Dearborn*, &c., unlawfully barter and sell spirituous liquors, by a less quantity than a gallon at a time, to *James Nesbit*, by retail, he not being licensed according to law to vend spirituous liquors by retail. Plea, not guilty. Trial by the Court, and judgment for the state.

The evidence given in the cause is upon the record. It was shown that *Rust*, on the day mentioned in the information, at his own house in *Lawrenceburgh* township, in said county, sold spirituous liquors, as charged, to the person therein named. *Rust* then proved that at the spring election for said township in the year 1852, a majority of the voters decided in favor of granting license; and that pursuant to an order of the board of commissioners of said county, a license to retail spirituous liquors at his house in said township, for one year from the 17th of *June*, 1852, was issued and delivered to him by the auditor of said county. That license is set out in the record.

This judgment cannot be sustained. The information charges an offence under the act to regulate the retailing of spirituous liquors, approved *March* 4, 1853. That act was not in force until the 19th of said month—four days after the commission of the alleged offence. Therefore, at the time of the retailing as charged and proved, it was not prohibited by law.

In addition, we think it is clear that the license in evidence constituted a valid defence to the prosecution. It was granted on the 17th of *June*, 1852, and by its terms covered the period when the retailing took place. Under the laws then in force, it was competent for the board of commissioners to grant licenses running one year. R. S. 1838, p. 582, ss. 3 and 4. These sections are continued in force by section 15 of chapter 59 of the R. S. of 1843. There is no statutory provision subsequent to those just cited, in conflict with the power of the commissioners to grant license for the period of one year. The defendant's license did not expire till the 17th of *June*, 1853.

Per Curiam.—The judgment is reversed.

Cause remanded, &c.

J. Ryman, for the appellant.

E. Dumont, for the state.

DUNN, Auditor of State, *v.* THE STATE on the relation of SEELEY.

By the R. S. 1852, sheriffs are entitled to mileage for taking a convict to the state prison, for each mile they may necessarily travel in going to and returning therefrom.

The provisions of s. 1, c. 37, R. S. 1852, vol. 1, and s. 1, c. 70, of the same volume, regulating sheriffs' fees for taking convicts to the state prison, are not repugnant to each other, and are to be construed in *pari materia*.

Wednesday, December 21.

APPEAL from the *Marion* Circuit Court.

DAVISON, J.—This was a writ of *mandamus*. The object of the proceeding was to compel the Auditor of State to audit the account of said sheriff to the amount of 130 dollars, for taking a convict from said county to the state prison. There was an answer to the writ. The Court,

Nov. Term, 1853.

DUNN v. THE STATE.

upon a final hearing of the cause, awarded a peremptory *mandamus*.

It is conceded that the sheriff performed the service, and that the distance between the county of *Elkhart* and the place where the state prison is located, is two hundred and sixty miles; but it is contended that for the service performed by the sheriff, one-half of the account presented, and no more, is allowable by law.

There is a statute which provides that the sheriff, "for taking a convict to the state prison, and all expenses incident to the same, shall be allowed twenty-five cents per mile, to be paid out of the state treasury." R. S. 1852, vol. 1, p. 285., s. 2. This section, it is said, contemplates mileage only for the actual number of miles traveled by him in going to the state prison. That construction might prevail were it not for a subsequent provision relative to that subject. By the same statutes—chap. 70, sec. 1—it is enacted, "that the sheriffs of the several counties in this state, for their services in conveying convicts to the state prison, shall be allowed mileage themselves in going to and returning therefrom," &c. The act then proceeds to point out the distance from each county respectively.

These provisions were enacted at the same session of the legislature, relate to the same subject, and are not repugnant to each other, and are to be construed in *pari materia*. This being done, we think the intention of the enactments is not doubtful. They were obviously intended to give the sheriff mileage for each mile he might necessarily travel in going to and returning from the state prison. It follows that the judgment of the Circuit Court must be affirmed.

Per Curiam.—The judgment is affirmed with costs.

R. L. Walpole, for the appellant.

L. Barbour and *A. G. Porter*, for the state.

Downey *v.* Day.

Where the evidence is not set out in the record, and the instructions were correct if a state of proof existed to which they were applicable, they will be presumed to have been pertinent.

Trespass for an assault and battery. Plea, *son assault demesne*. Replication, *de injuria*. *Held*, that the defendant had the right to open and close the evidence and argument to the jury.

ERROR to the *Randolph* Circuit Court.

Wednesday, December 21.

Roache, J.—*Day* brought an action of trespass for an assault and battery against *Downey*. Plea, *son assault demesne*. Replication, *de injuria*, &c. Issue joined, trial, verdict and judgment for the plaintiff below.

The plaintiff in error complains of the giving of certain instructions to the jury at the request of the plaintiff. The evidence is not set out. The instructions were all correct, if a state of proof existed to which they were applicable. In the absence of the testimony, we must presume they were pertinent.

On the trial, the defendant below claimed the right to begin and close the evidence and argument to the jury. Over his objection, the Court permitted the plaintiff to open and close. The defendant excepted. This was erroneous. The state of the issue threw the affirmative on the defendant, and entitled him to the beginning and conclusion. 2 Stark. Ev. 826.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Kilgore, for the plaintiff.

W. A. Peelle and *T. J. Sample*, for the defendant.

Nov. Term, 1853.

THE STATE v. SHUFFLEBARGER.

THE STATE *v.* SHUFFLEBARGER.

Chapter 132 of the acts of 1851 repealed c. 13 of the acts of 1847, and revived c. 73 of the R. S. 1843.

The last-named chapter having provided that prosecuting attorneys should receive the same compensation as was then provided by law, their compensation was to be regulated by s. 1, c. 40, R. S. 1838.

Wednesday, December 21.

APPEAL from the *Johnson* Circuit Court.

ROACHE, J.—Motion for the taxation of costs.

The defendant plead guilty to an indictment for gaming. After judgment against him, the clerk taxed a docket fee against him, in favor of the prosecuting attorney, of 4 dollars. On motion, the Court reduced the docket fee to 2 dollars and 50 cents. The prosecuting attorney excepted. He insists that he is entitled to the fee allowed by the act of *January* 27, 1847, page 54, sec. 6, which entitles the prosecuting attorney to a fee of 4 dollars on a plea of guilty.

The act of *February* 14, 1851, page 141, sec. 1, repeals the latter act *in toto*. If it made no further provision, the prosecutor would be entitled to no fee. But section 2 revives the act of *February* 11, 1843, (R. S. 1843, p. 1048). The latter act provides that prosecuting attorneys should receive the same compensation as was at that time provided by law. We have not been able to find any act relative to the fees of the prosecutor in such cases, later than 1838, (R. S. 1838, p. 293) which allows him, on a plea of guilty, 2 dollars and 50 cents. This not having been repealed, was, at the date of the revived act, the only law fixing his compensation in such cases.

The taxation was correctly reduced by the Court.

Per Curiam.—The judgment is affirmed with costs.

D. S. Gooding, for the state.

G. M. Overstreet and *A. B. Hunter*, for the appellee.

Nov. Term, 1853.

BAKER v. RAILSBACK.

The amount paid to discharge an incumbrance upon land conveyed with a warranty against incumbrances, may, if reasonable, and the least for which the incumbrance could be bought in, be set up as a defence, (in the absence of any other controlling agreement between the grantor and grantee) by way of recoupment, to a suit by the assignee or payee of a note given for the last instalment, at least, of the purchase-money.

ERROR to the *Marion* Circuit Court.

Wednesday, December 21.

PERKINS, J.—Assumpsit upon a promissory note executed by *Railsback* to one *Strang*, and by him assigned to the plaintiff, *Baker*.

The defendant pleaded, as to the sum of 200 dollars, part of the sum called for by the note, that said note was given for the last payment on a lot of ground purchased by said *Railsback* of said *Strang* for the price of 1,400 dollars, 1,100 dollars of which were paid in hand, and said note given for the residue, 300 dollars; that said *Strang* executed to said *Railsback*, on the purchase, a warranty deed, covenanting that said land was free from all incumbrance, &c., when, in fact, it was not so, but was incumbered by a right of dower, in this, that the then wife of the grantor of *Strang* had never relinquished her dower, and that she was still living; that the defendant, *Railsback*, often requested said *Strang* to remove said incumbrance, but he failed to do so, in consequence whereof, the defendant, on, &c., at, &c., in order to get a relinquishment of said right of dower, was compelled to and did actually pay the sum of 200 dollars, "the same being a reasonable price therefor, and the smallest sum for which the same could be procured," and for which sum relinquishment was obtained, &c.

General demurrer to this plea overruled, and judgment, as to 200 dollars, for the defendant, on the demurrer.

The decision of the Court below was right. There is no open question in the case.

In *Doremus* v. *Bond*, 8 Blackf. 368, it is decided that the

Nov. Term, 1853.

BAKER v. RAILSBACK.

amount paid to extinguish an incumbrance on land conveyed by deed with full covenants of warranty, may be set up as a defence, the amount being reasonable, to, at all events, the payment of the last instalment of the purchase-money, as well against the assignee, as against the original payee of such instalment; and further, that "the defendant is not bound to plead the matter by way of set-off, springing as it does out of the default of the vendors in relation to the original contract, and not from any new or subsequent dealing," but that he may recoup it from the original consideration. And *Whisler* v. *Hicks*, 5 Blackf. 100, and *Smith* v. *Ackerman*, *id.* 541, are to the point that a purchaser of land, with covenants as aforesaid, may proceed and voluntarily extinguish the incumbrances that may exist on it, and avail himself of the right of recoupment.

We concur in those decisions. Land in this country is an article of traffic, and an incumbrance clogs its sale and embarrasses the owner. He should have the right to clear his property of incumbrances, that it may be made as facile of transfer, and as useful to himself as possible.

It should be remarked that in speaking of the right of the purchaser to extinguish incumbrances, and recoup the amount, it is taken for granted that no agreement, express or implied, exists between the grantor and grantee of the land, in regard to the matter; as such agreement might control the right that would otherwise exist. See *Allen* v. *Lee*, 1 Ind. R. 58.

Per Curiam.—The judgment is affirmed with costs.

J. Caven, for the plaintiff.

J. L. Ketcham and *N. B. Taylor*, for the defendant.

MALIN *v.* COULT.

The vendee of land, who had not paid all the purchase-money nor received a deed, died in 1829, leaving a widow surviving him. *Held*, that the widow had only an equitable right, under the statute, to be endowed of the interest during her life of one-third of the amount the land would sell for over the unpaid purchase-money, interest and costs. *Held*, also, that her claim might be compromised and discharged by a parol agreement with the vendor or his assignee.

ERROR to the *Switzerland* Probate Court.

Wednesday, December 21.

PERKINS, J.—Bill for dower, filed in *January*, 1845, in the *Switzerland* Probate Court, by *Frances Coult* against *Joseph Malin*. Decree below for the plaintiff.

It appears that in 1827, *John D. Coult*, then the husband of said plaintiff, purchased of one *William Campbell* a tract of land situate in *Switzerland* county, *Indiana*, for the sum of 500 dollars, 250 dollars of which he paid down, and 250 dollars of which he was to pay at a future day, and before receiving a deed. *Coult* went into possession, and died upon the premises in *September*, 1829, without having paid the balance of the purchase-money for the land.

In *August*, 1830, *Campbell* again sold the land, by deed in fee-simple, to *Joseph Malin*, the defendant below, for 550 dollars, informing him at the time of the previous sale to *Coult*, the payment by him of a part of the purchase-money, his failure to pay the balance when due, and stating to him that his purchase must be subject to the rights of the widow and heirs of *Coult*, if any they had, in the premises. In *March*, 1831, *Malin*, upon the legal title so conveyed to him by *Campbell*, recovered possession of the premises by a suit in ejectment.

Malin, by his attorney, *J. F. D. Lanier*, called on Mrs. *Hackett*, the administratrix on *Coult's* estate, and on Mrs. *Coult*, the widow, to ascertain if they would pay up the remainder of the purchase-money left unpaid by *Coult*, and received for answer from both of them that the estate

Nov. Term, 1853.

MALIN v. COULT.

was unable to make the payment, but that they wished the amount paid by *Coult* refunded. *Coult* had made some improvements on the place while enjoying the use of it.

Subsequently, in *September*, 1835, ten years before this suit was brought, Mrs. *Hackett* and Mrs. *Coult* compromised with Mr. *Malin* the claims they set up on account of the 250 dollars paid by Mr. *Coult*, receiving from him severally, Mrs. *Coult* 100 dollars, and Mrs. *Hackett* 201 dollars and 40 cents, making in all 301 dollars and 40 cents, which has not been refunded. We may remark that Mrs. *Hackett* states, in her testimony, that Mrs. *Coult* did not receive 100 dollars, nor any sum; though she admits there was a settlement which, she says, she never understood, and, hence, not much weight attaches to her statement. We regard the proof as showing clearly enough that the facts are as we have stated them; and we have stated all that are mentioned.

The Court below gave Mrs. *Coult* a decree for 150 dollars.

Mr. *Coult* never having paid in full and obtained a deed for the land bargained for, his widow had only an equitable right to be endowed, under the statute, in the interest which the payment her husband had made created; and that right, it is decided in *Crane* v. *Palmer*, 8 Blackf. 120, was subordinate, and one that must yield to the seller's lien for unpaid purchase-money. In this case, *Malin*, by his purchase from *Campbell*, to whom the unpaid purchase-money was then due, was placed in his shoes, and vested with all his rights, as well as liabilities, in the matter in question. Such was his agreement. The balance due from *Coult*, then, on the purchase of the land, remaining unpaid, *Malin* might have filed a bill to extinguish the equity existing in favor of *Coult's* widow and heirs, and Mrs. *Coult* could only have claimed as dower the interest for life of one-third that the land might have sold for over and above the unpaid purchase-money, interest and costs. This would have been a mere money demand, which she might have compromised by parol, and

received satisfaction for; and this we think she did, and very advantageously. The authorities, indeed, extend her power of barring her claim to dower beyond what is called for in this case. In *Jones* v. *Powell*, 6 Johns. Ch. R. 194, Chancellor *Kent* says—There is no reason why a widow, who is a free and competent moral agent, should not have the capacity to agree to any fair arrangement which convenience or prudence dictated, by which her dower should be extinguished by an equivalent substitute in money or in land. See, also, *Cox* v. *Jagger*, 2 Cowen 638.—*Shotwell* v. *Sedam*, 3 Ohio R. 1.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Probate Court to dismiss the bill.

J. Sullivan and *J. Dumont*, for the plaintiff.

D. Kelso, for the defendant.

WATSON *v.* ALLEN.

Where a series of long and complicated dealings is involved in a trial, the verdict of the jury, unless grossly unjust or founded in palpable mistake, will not be disturbed by the Supreme Court, notwithstanding the plaintiff may have remitted a part of the verdict.

Where on a careful review of the evidence given in a cause the conclusions of the Supreme Court would differ widely from those of the jury, it is still deemed safer to defer to their decision.

Where the verdict is in accordance with the evidence, it is immaterial what instructions were given or refused.

Wednesday, December 21.

ERROR to the *Vigo* Circuit Court.

STUART, J.—Assumpsit on the common counts, and damages laid at 12,000 dollars. Pleas, the general issue and a set-off. Trial by jury. Verdict for the plaintiff below, *Allen*, for 1,538 dollars and 58 cents. Remittitur for 864 dollars and 12 cents. Motion for a new trial overruled,

Nov. Term, 1853.

WATSON v. ALLEN.

and judgment for the residue. The evidence is made part of the record.

It is said there is palpable hardship in the verdict. We do not think the evidence shows it. We have taken pains to make our own figures, and after deducting the sum remitted, the excess is not such as to warrant us in disturbing the verdict. In a series of long, complicated dealings, like that before us, it is not to be expected that entire accuracy could be attained. The jury, whose peculiar province it was to sift out the facts from the mass of evidence before them, have found for the plaintiff, *Allen;* and unless the verdict be grossly unjust, or founded in palpable mistake, notwithstanding the sum remitted, the verdict must be respected. *Mann* v. *Clifton*, 3 Blackf. 304.

A court of errors cannot see the whole case as a jury or as the presiding judge sees it. The manner in which a witness testifies, and many other intangible incidents in the progress of a trial tending to give point to one part of the evidence and discredit another part, cannot be presented for review. They are wholly lost in this Court. And when the presiding judge coincides with the verdict, by overruling the motion for a new trial, it would be hazardous for us to disturb such adjudications. Even when on a careful review of the evidence, our own conclusions would differ widely from those of the jury, we still feel it safer to defer to the tribunal which the theory of our institutions wisely deems more competent for the determination of facts.

Even in criminal cases of a high grade, this has long been the settled rule acted upon by the Court. 7 Blackf. 186.—*Ledley* v. *The State*, at this term. Much more should it be adhered to in civil cases.

The verdict being substantially right on the evidence, the instructions given or refused are immaterial.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

W. D. Griswold, for the plaintiff.

J. P. Usher, for the defendant.

Nov. Term, 1853.

BURTON v. BRADEN.

BURTON v. BRADEN.

Wednesday, December 21.

ERROR to the *Decatur* Circuit Court.

STUART, J.—Bill in chancery charging usury, running through a series of contracts and condensed into an outstanding note of 67 dollars and 53 cents, given by *Burton* to *Braden*, and which the bill prays may be enjoined. Also general prayer for relief.

The answer admits that *Braden* and *Burton* had transacted the business in the manner alleged in the bill. From the admissions in the answer (for there are no depositions) we find by computation that if *Braden* be allowed legal interest on his money, there is yet due to him 19 dollars. On the other hand, if *Braden* is only entitled to recover the principal, as counsel insist, then he is overpaid considerably. The only question is, which rule shall prevail.

In settling this question we are not aided by counsel—for *Burton's* cites no authorities, and *Braden's* files no brief. It is such cases that delay the business of the Supreme Court.

On the authority of *Muir* v. *Clark*, 7 Blackf. 423, and *Muir* v. *Pousler et al.*, 2 Ind. R. 643, *Braden* is entitled to legal interest on the loan. *Burton* not having brought himself within the rule laid down in these cases, the decree below must stand.

Per Curiam.—The decree is affirmed with costs.

J. S. Scobey, for the plaintiff.

J. Robinson, for the defendant.

4 540
165 160

Nov. Term,
1853.

4 540
170 654

TAYLOR
v.
THE STATE.

TAYLOR *v.* THE STATE, on the complaint of DIANA WHITE.

Where a party has had ample time to prepare for trial, and witnesses by whom he could have proved important facts were in his neighborhood, and being aware of their knowledge of such facts, he did not examine them on the trial, on account of a distrust of his ability to elicit the truth, he cannot obtain a new trial in order to avail himself of their testimony.

A verdict will not be set aside to admit evidence to impeach the credit of a witness, unless such evidence is strong, and pointed directly to the merits, so as to raise a violent presumption of its being successful with the jury.

Friday, December 23.

APPEAL from the *Noble* Circuit Court.

ROACHE, J.—This information was tried in 1846, and *Taylor* found guilty as the putative father, and adjudged to pay 150 dollars, in instalments. A motion for a new trial being overruled, the evidence was set out in a bill of exceptions.

The ground chiefly relied on was newly discovered evidence. *Taylor* produced his own affidavit, and that of the proposed witness. So far he brought himself within the rule.

But he does not show that he had used due diligence to avail himself of the evidence on the trial.

The proposed witness is the brother-in-law of *Diana White*, with whom she lived during the period, &c. The complaint was made in *September*, 1845; the trial took place in *March*, 1846. *Taylor* had six months to prepare his defence. He lived in the immediate vicinity of the parties. He was not ignorant of the facts within the knowledge of the family where *Diana* resided, but distrusted his ability to elicit the truth. Hence, he did not closely examine *Diana's* sister when she was on the stand—did not even inquire whether she had received attentions from other men, and did not venture to examine the brother-in-law at all.

Having thus gone to trial unprepared, when witnesses so suggestive of important evidence were within his reach, and yet from considerations of prudence were not

even called, he must abide the consequences of his election. To relieve him by granting a new trial under such circumstances, would be to encourage neglect and remove all salutary stimulants to diligent preparation.

Nor is the newly discovered evidence of Doctor *Joslin*, (the brother-in-law), as set out in his affidavit, of a character to favor the relaxation of the rule.

It is chiefly impeaching. *Diana* had answered in chief that she had had no connection with any other man about the time, &c. *Joslin's* evidence, if believed, would tend to show that she had received attentions from two other men, under what the witness considered suspicious circumstances. This would be a feeble impeachment.

The statements of both witnesses might be true. Unless the impeaching evidence is strong, and pointed directly to the merits, so as to raise a violent presumption of its being successful with the jury, the verdict should not be disturbed. *Mechanics' Fire Insurance Company* v. *Nichols*, 1 Harr. 410. Courts do not favor new trials for the purpose of impeachment. *McIntire* v. *Young*, 6 Blackf. 496.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

W. H. Coombs, for the appellant.

S. Bigger, *J. K. Edgerton*, *R. A. Riley*, *N. B. Taylor* and *J. Coburn*, for the state.

4 541
127 313

THE STATE *v.* ROSS.

Indictment against a justice of the peace, under s. 83, c. 53, R. S. 1843, for an improper refusal to grant a change of venue and the rendition afterwards of a judgment against the defendant without his consent. The indictment charged that the defendant rendered the judgment *corruptly*, but did not state that he knew his decision to be in violation of law. *Held*, that even if an indictment would lie for the acts charged, the indictment in question was bad.

Nov. Term, 1853.

THE STATE v. ROSS.

Friday, December 23.

ERROR to the *Boone* Circuit Court.

ROACHE, J.—Indictment against *Ross*, charging him with having been guilty of oppressive conduct in the administration of his office as a justice of the peace.

The oppressive act is alleged to have taken place on the trial of a cause pending before him, between one *Rhinehart*, plaintiff, and one *David Falls*, defendant. The indictment charges that on the calling of the cause for trial, *Falls* presented an affidavit, in proper form, praying for a change of venue on account of the bias and prejudice of the justice. *Falls* offered to pay the costs, according to the requirement of the statute, and demanded a change of the venue. The justice overruled the motion, but proceeded to try the cause against the consent of *Falls*, and rendered a judgment against him.

The indictment was quashed by the Circuit Court. The state prosecutes this writ of error.

The indictment is founded on s. 83, c. 53, R. S. 1843. It is not altogether clear that the provisions of the act are applicable to the judicial acts of a justice. It is made an offence in a clerk of the Circuit Court, constable, coroner, sheriff, and justice of the peace, to be guilty of any act of oppression in the administration or by color of his office. The justice has both ministerial and judicial duties to perform; the other officers mentioned, ministerial alone. There is no distinction made by the act in the description of the offence or its punishment. By classing the justice, in general terms, with officers whose duties are ministerial only, it might raise the question whether the act could be construed to be applicable to the judicial acts of the justice.

But that question does not arise in this case. For admitting that the act with which he is charged is punishable under the provisions of the statute, the indictment does not sufficiently charge the offence.

The application for a change of venue is a motion to be considered and decided by the justice in his judicial capacity. He is not liable, criminally, for an erroneous decision, made either through ignorance or misapprehen-

sion of the law. To convict him on a charge of corruptly rendering an unlawful judgment, it would have to be established by proof at the trial, that he knew his decision to be contrary to law. His knowledge is the gist of the offence. In the absence of such knowledge, there is no crime. And being of the substance of the offence, the indictment must allege that he did know his decision to be a violation of law. The indictment in this case contains no such allegation; it only charges the act to have been done corruptly. The use of an expletive cannot supply the want of a material allegation, constituting the very gist of the offence.

Per Curiam.—The judgment is affirmed.

W. J. Peaslee, for the state.

H. and *I. Brown*, for the defendant.

THE STATE on the relation of HAYES, Administrator, *v.* CHEEK and Others.

Debt against a clerk of the Circuit Court and his sureties on his bond, for his failure to account for the amount of a judgment in favor of *A.* received by him. The defendants proved payments made by the clerk as follows: 1. That on *October* 4, 1842, the clerk deposited 100 dollars in bank to *A.'s* credit; 2. A receipt of *A.*, indorsed on the record of the judgment, for 175 dollars, without date. *Held*, that it was a question for the jury, whether the sum deposited in bank was included in the receipt.

The verdict of a jury will not be disturbed unless there is a clear and manifest preponderance of evidence against it.

APPEAL from the *Dearborn* Circuit Court.

Friday, December 23.

ROACHE, J.—This was a suit by the state on the relation of the administrator of *Silas P. Hayes*, deceased, against *Cheek* and his sureties, on his official bond as clerk of the *Dearborn* Circuit Court.

The declaration alleged as a breach of his bond, that he had, as clerk, collected on a judgment in favor of the

Nov. Term, 1853.

THE STATE v. CHEEK.

said *Silas P. Hayes*, deceased, against one *Jackson*, 296 dollars and 97 cents, on the 21st day of *May*, 1842, and had failed and refused to pay or account for the same.

The sureties filed two pleas: 1. That after *Cheek* collected the money and before suit, said administrator agreed with *Cheek* that the latter might keep and use the money until called for, without the knowledge or consent of the said sureties. 2. Payment.

Cheek filed separate pleas. 1. Payment. 2. That no demand had been made before suit.

Issues were taken on all the pleas, and the Court, to whom the cause was submitted by agreement of the parties, found for the defendants, and judgment was rendered accordingly.

The only question made by the appellant is, whether the pleas of payment were sustained by the evidence.

The defendants proved payments made by *Cheek* to the plaintiff as follows:

1. That on the 4th of *October*, 1842, *Cheek* deposited 100 dollars in bank, to the credit of said administrator.

2. A receipt of the administrator indorsed on the record of the judgment, for 175 dollars, without date.

3. A receipt of the administrator written immediately under the preceding, dated *August* 5, 1844, for 30 dollars and 31 cents. These items together amounted to 305 dollars and 31 cents. On the trial, the administrator admitted that the 100 dollars deposited in bank was a valid payment on the *Jackson* judgment, but insists that it was included in the receipt for 175 dollars. *Cheek* contends it was in addition to the latter.

This is the whole subject in controversy.

There was some proof introduced by the plaintiff below designed to support his view of the case; but it is very far from being conclusive or satisfactory. It left the case substantially standing upon the evidence as to the payments as stated above. In such cases it is the peculiar province of the jury to deduce conclusions from all the circumstances. Here the agreement of the parties substituted the finding of the Court for the verdict of a jury.

This Court will not interfere, unless there is a clear and manifest preponderance of evidence against the finding of the Court below.

Per Curiam.—The judgment is affirmed with costs.

P. L. Spooner, for the state.

E. Dumont, for the appellees.

Oungst *v.* Dils.

Under ss. 148, 150 and 157 of c. 47 of the R. S. 1843, the Circuit Court had no jurisdiction in a proceeding by *scire facias* on a justice's transcript to bind real estate, where the transcript was not filed in the clerk's office within two years from the rendition of the justice's judgment, or the return of the execution that no property could be found, &c.

Friday, December 23.

ERROR to the *Warren* Circuit Court.

Perkins, J.—*Scire facias* upon the transcript of a judgment of a justice of the peace filed to bind real estate.

There were two returns of "not found," in the *Warren* Circuit Court, and judgment by default awarding execution.

The *scire facias* states that the transcript of the judgment of the justice, (being a judgment for a fraction over 20 dollars), was filed in the clerk's office on the 31st day of *January*, 1849; that it appeared from said transcript that an execution had issued on said judgment and been returned no property, &c., in *December*, 1841; and that said judgment was in force, &c.

The *scire facias* shows, therefore, that more than two years elapsed from the return of execution, no property found, to the filing of the transcript in the clerk's office.

But, as we understand sections 148, 150, and 157, pp. 887 and 888 of the R. S. of 1843, Circuit Courts had, under said statutes, no jurisdiction in cases of *scire facias*

Nov. Term, 1853.

THE UNKNOWN HEIRS OF WHITNEY v. KIMBALL.

on transcripts of justices of the peace to bind real estate, where said transcripts were not filed within two years from the rendition of the judgment, or the return of the execution that no property could be found, &c.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with leave to the plaintiff to amend the writ of *scire facias*, &c.

B. F. Gregory, for the plaintiff.

R. A. Chandler, for the defendant.

THE UNKNOWN HEIRS OF WHITNEY *v.* KIMBALL.

Where a debtor is living and possesses an equitable interest in real estate, inasmuch as the creditor acquires at law, by the judgment, a lien on the real estate in which the debtor has a legal interest, equity, in aid of the law, carries along the lien and enforces it against real estate in which the debtor has only such equitable interest. And as by law the creditor acquires, by judgment and execution, a lien on the personal property to which the debtor has the legal title, equity enforces the lien on the equitable interest of the debtor in personal property. But it does this only where a judgment, which constitutes the lien at law, in one case, and a judgment and an execution, in the other, have been obtained.

Where, however, the original debtor is dead, a judgment at law need not, in this state, be obtained before going into chancery for the collection of the debt.

In the latter case the jurisdiction rests on the ground that executors, administrators and heirs are, or may be, trustees for creditors, and, hence, are liable to be called to account in chancery.

Where a remedy also exists at law, the two jurisdictions are concurrent.

Chancery having, where the debtor is deceased, jurisdiction in the first instance and independent of all accidental circumstances, for the collection of the debt, the question whether the debtor had other property capable of being subjected at law to the payment of the debt, is immaterial.

Where the bill is filed by one, or a few creditors, in behalf of all, they are all allowed to come in under the decree, prove their claims, and have them paid in the course of administration.

A bill filed to subject to the payment of a judgment the equitable estate of

a deceased debtor, which does not make his administrator a party, must allege that none had been appointed.

To a bill against unknown heirs, the plaintiff was required by the R. S. 1843, to annex an affidavit of his want of knowledge of their names, and that their residence is, as he verily believes, not in this state.

The R. S. 1852 require, in a like case, the same affidavit.

ERROR to the *Lagrange* Circuit Court.

Friday, December 23.

PERKINS, J.—*Warren Kimball*, in behalf of himself and other creditors, filed a bill in chancery in the *Lagrange* Circuit Court, setting forth that *Horace Thatcher* and *Michael T. Whitney* were indebted to him in *Ohio*, by promissory note, in the sum of 400 dollars; that about one year after the execution of said note, to-wit, in 1838, said *Whitney* departed this life; that in *January*, 1839, judgment was obtained on the note in *Ohio*, against the other joint maker, a man destitute of all property, and who, in 1842, procured his discharge in the *United States* District Court of *Ohio* as a bankrupt; that *Whitney*, deceased, left no property except a tract of land particularly described, lying in *Lagrange* county, *Indiana;* that he left heirs whose names were unknown. He prayed a decree for the sale of the land, &c.

No affidavit was annexed to the bill, nor did it allege that the heirs were non-residents, nor that no administrator had been appointed on *Whitney's* estate.

Notice by publication in a newspaper, on a return of "not found" by the sheriff, was given of the pendency of the suit. Default by the defendants. Creditors, other than the plaintiff, *Kimball*, were permitted to come in and prove their claims. Sale of the land decreed, &c.

To this decree it is objected—

1. That the creditors had not obtained judgments upon their claims before attempting to enforce their collection by this proceeding.

Where the debtor is not dead, and possesses an equitable interest in real estate, inasmuch as by law the creditor acquires by judgment, a lien on real estate in which such debtor has the legal interest, equity, in aid of the law, carries along the lien, and enforces it against real

Nov. Term, 1853.

THE UNKNOWN HEIRS OF WHITNEY v. KIMBALL.

estate in which the debtor has only such equitable interest. And as, by law, the creditor acquires, by judgment and execution, a lien on the personal property to which the debtor has the legal title, equity enforces such lien on the equitable interest of the debtor in personal property. But it does this only where a judgment, which constitutes the lien at law in the one case, and a judgment and execution in the other, have been obtained.

Where, however, the original debtor is dead, the law is settled in this state, that a judgment, even at law, need not be obtained before going into chancery for the collection of the debt. In *Martin* v. *Densford*, 3 Blackf. 295, the Court say: "It is true that it is a well-settled general principle, that a party cannot apply to a court of equity, if he have a full and complete remedy at common law. To this general and salutary principle there are, however, a few exceptions, one of which is, where the debtor is dead, and the creditor has to proceed against his heirs, executors, or administrators. In such cases, courts of equity have concurrent jurisdiction with courts of law; and the creditor may elect into which court he will go." See, also, *Sweny* v. *Ferguson*, 2 Blackf. 129.—*O'Brien* v. *Coulter*, *id.* 421.—*Kipper* v. *Glancey*, *id.* 356.—*Bryer* v. *Chase*, 8 *id.* 508.

This jurisdiction rests on the ground that executors, administrators and heirs, are, or may be, trustees for creditors, and, hence, are liable to be called to account in chancery. And if, in a given case, a remedy exists at law also, the two jurisdictions are, in such case, concurrent.

2. The second objection is, that *Whitney's* insolvency was not proved.

There is nothing in this objection. Chancery having, as we have seen, jurisdiction in the first instance, and independent of all accidental circumstances, for the collection of the debt, the question of solvency or insolvency could have no influence with the Court in the determination of the cause.

3. It is objected that creditors, other than the plaintiff in the bill, were permitted to come in and prove their

claims. But this bill was filed by the plaintiff expressly in behalf of himself and all other creditors. He did not, even if he could have done so, (a point on which it is not necessary for us now to say anything), claim any preference over other creditors in the payment of his demand. And where a bill is filed by one, or a few, in behalf of all the creditors, all are allowed to come in under the decree, prove their claims, and have them paid in the course of administration. Story's Eq. Pl., p. 125.—*Barton* v. *Bryant*, 2 Ind. R. 189.—*McNaughtin* v. *Lamb*, *id.* 642.

4. There was no allegation in the bill that an administrator had not been appointed on *Whitney's* estate.

This is a good objection. The bill should have made the administrator or executor, if either existed, a party; and if neither existed, it should have alleged the fact in excuse. The reason is, the personal estate which the executor or administrator represents, is the primary fund out of which debts should be paid.

5. The point is also made, that there is no affidavit to the bill, or in the case, that the names of *Whitney's* heirs were unknown; and it presents a radical defect in the proceedings. The statute of 1852, R. S., 2 vol., p. 36, which is a transcript of that of 1843 upon this subject, (see R. S. of that year, p. 833), enacts that the plaintiff "shall annex to his complaint an affidavit of his want of knowledge of their names, and that their residence is, as he verily believes, not in this state."

This statute must be substantially complied with.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

R. Brackenridge, for the plaintiffs.

J. B. Howe, for the defendant.

Nov. Term, 1853.

BURTON v. McGREGOR.

BURTON *v.* McGREGOR and Another.

The R. S. 1838 did not give to the undertaking of a replevin-bail in a justice's Court the force of a judgment, but merely that of an obligation to pay the judgment, if it could not be made by an execution against the principal.

A joint execution could not, under the R. S. 1838, be issued by a justice of the peace against a judgment-debtor and his replevin-bail.

Before the plaintiff could proceed by *scire facias*, under the R. S. 1838, against a replevin-bail, before a justice of the peace, it was incumbent upon him to have an execution against the principal returned "no property found," &c.

A party prosecuting a *scire facias* against a replevin-bail upon an alleged revived judgment against the principal, may be required to show that the judgment has been revived.

A proceeding by *scire facias* to revive a judgment, is a suit in which the defendant is entitled to notice, and to appear and plead, and to have a trial of the issues.

Such proceeding falls within the cases in which the statute fixes a time within which a justice shall render judgment.

The failure of the justice to enter such judgment, within the period required by the statute, works a discontinuance of the suit.

The justice cannot afterwards amend by entering up the judgment as of a period within that fixed by the statute.

In *October*, 1838, *A.* became replevin-bail upon a justice's judgment. In a proceeding by *scire facias*, in 1849, for an execution against the bail, he pleaded the statute of limitations. *Held*, that the plea was properly rejected.

Friday, December 23.

ERROR to the *Vigo* Circuit Court.

PERKINS, J.—*Scire facias* to obtain execution against replevin-bail. Judgment below awarding execution.

The cause originated before a justice of the peace.

On the 24th of *September*, 1839, *Matthew Stewart* obtained a judgment by default before a justice of the peace of *Vigo* county, against *Stephen P. Cammack*. The summons was served on *Cammack* on the 21st, and judgment was rendered against him, as has been said, on the 24th of the same month. On the 29th of *October*, 1839, *John Burton* entered himself replevin-bail to said judgment. Subsequently, *Matthew Stewart* died, and *Alexander McGregor* and *Elizabeth Stewart* were appointed his executors, and revived, in their names, the judgment against *Cammack*, and, on the 23d of *March*, 1849, moved

before the justice for a *scire facias* to obtain an award of execution against him, such a step having become necessary from the lapse of time since the issuing of a former one.

Two returns of "not found" were obtained and noted on the docket, the second being on the 4th of *April*, 1849. No judgment was rendered by the justice. An execution, however, issued, purporting to be upon a judgment upon the *scire facias*, and for the debt, and interest and costs of the original judgment, and a judgment upon the *scire facias* against *Cammack*, on the 21st of *May*, 1849, which was returned on the 5th of *June* following, "no property," &c.

On the 18th of the same month the *scire facias* in this suit issued against *Burton*, the replevin-bail. It alleged a revived judgment, and an execution thereon, against *Cammack*, and was returnable on the 25th of *June*, at which time the cause was continued to the 7th of *July*. At that date, the justice amended, as it is called, by entering up judgment on his docket against *Cammack*, the judgment-debtor, on the second return of "not found" made to the *scire facias* against him on the 4th of *April* previous.

The defendant objected.

A plea by *Burton* of the statute of limitations was rejected in the Circuit Court, and, as has been stated, that Court gave judgment, as the justice had done, awarding execution against *Burton*.

At the time *Burton* became replevin-bail upon the judgment against *Cammack*, the law did not give to his undertaking the force of a judgment, as, since the statutes of 1843, it has to similar ones. His amounted simply to an obligation to pay the judgment if it could not be made by an execution against the principal debtor, and constituted the foundation on which a judgment against the bail might be placed upon such a contingency having happened. No joint execution could then, as it can now, issue against the judgment-debtor and the bail, before a justice of the peace; and it devolved upon the plaintiff,

Nov. Term, 1853.

BURTON v. McGREGOR.

before attempting to proceed by *scire facias* against the bail, to have an execution returned "no property," &c., against the principal; and it was necessary, on the trial upon the *scire facias*, for him to prove that he had done this. In the present case, had the execution-plaintiffs elected to issue an execution on the original judgment, without a revivor against *Cammack*, and succeeded in procuring a return of "no property" upon it, there being no motion interposed to set it aside before its return, we do not decide what the effect might have been. As it is, the plaintiffs elected to revive, and to issue their execution, according to its purport, upon the revived judgment, and their proof upon the trial must necessarily have corresponded. They might, therefore, upon such trial, have been called upon to show a revived judgment against *Cammack*, as the foundation of the execution against him. This shows that the amendment by the justice, in entering up judgment against *Cammack*, was material in the present suit, and that, consequently, the defendant in it had a right to raise the question as to his power to make the amendment.

A proceeding by *scire facias* is a suit in which the defendant must have notice, is entitled to appear and plead, and have a trial of issues made. It falls, therefore, within the cases in which the statute fixes the time for the rendition of judgment. The longest time allowed is four days from the submission of the cause. Upon a default, the return-day of process, when service has been made in time, is the day of submission, unless a continuance is entered. None was entered in the case in question. The failure of the justice, therefore, to enter judgment within the period required, worked a discontinuance of the suit, and terminated his authority over it. The plaintiff should have recommenced the suit. The entry of judgment by the justice, at the time he did, was an act *coram non judice*, and void. *Young* v. *Rummell*, 5 Hill (N. Y.) R. 60.

The Court did right in rejecting the plea of the statute of limitations. It was only judgments before a justice

that were barred by the statute. The entry of bail in this case, as we have seen, was not a judgment.

Had *Commack* interposed the plea to the *scire facias* against him to revive, it would have been a bar. *Stipp* v. *Brown*, 2 Ind. R. 647.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. P. Usher, for the plaintiff.

Shaw *v.* The State.

Where the bill of exceptions does not profess to contain all the evidence, it will be presumed that a state of facts existed to which the instructions complained of were applicable.

Friday, December 23.

ERROR to the *Randolph* Circuit Court.

Stuart, J.—*Shaw* was indicted for malicious trespass in destroying fanning mills. In each of the three counts the property is alleged to be in different persons; but it seems no evidence was offered under the second and third counts. Trial by jury. Verdict and judgment for the state. There is no brief on either side, and no authorities cited in the general assignment of errors.

The bill of exceptions does not profess to set out all the evidence. We must presume that a state of facts might exist to which the instructions complained of were applicable, and thus the instructions properly given. It is not to be supposed that the defendant omitted to place anything in the record which would have made the case more favorable for him in this Court.

Per Curiam.—The judgment is affirmed with costs.

D. Kilgore and *W. A. Peelle*, for the plaintiff.

W. Garver and *D. S. Gooding*, for the state.

Nov. Term, 1853.

Sunman v. Babcock.

The State *v.* Lockstand.

Friday, December 23.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Stuart, J.—This case is headed "nuisance." Motion to quash correctly sustained for the reasons given in *The State* v. *Hurley*, at the present term. (1)

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

(1) Another case of the state against the same party was affirmed, on the same day, for the reasons given in this case.

The State *v.* Lockstand.

Friday, December 23.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Stuart, J.—This case, like *The State* v. *Hurley*, is for retailing liquor; under what part or section of the liquor law we have not been able to determine. For the reasons given in that case and in *Brutton* v. *The State*, and *The State* v. *Miles*, at the present term, the action of the Court in quashing the information was correct.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

Sunman *v.* Babcock.

Friday, December 23.

ERROR to the *Ripley* Circuit Court.

Per Curiam.—This was a motion to tax costs.

It appears that a cause wherein the said *Babcock* was plaintiff and *Sunman* defendant, had been submitted to a

jury; that the jury failed to agree upon a verdict; and the object of the motion was for the taxation against the plaintiff of all the costs made by him in said cause previous to its submission to the jury. The Court overruled the motion.

This was correct. The record does not disclose a final judgment in the case. If the motion was made before such judgment it was premature, and, therefore, properly overruled. And for aught that appears, the cause may have been determined against the plaintiff. In that event, the costs would have followed the judgment, without any motion for taxation. The record being silent as to the final disposition of the suit, we must presume in favor of the ruling of the Court.

Per Curiam.—The judgment is affirmed with costs.

D. Kelso and *J. W. Gordon*, for the plaintiff.

G. Holland, for the defendant.

Ellsworth *v.* Buell and Another.

Declaration in covenant by the obligee against the makers of an agreement under seal, dated *May* 8, 1845, by which the makers promised to pay the obligee 217 dollars and 50 cents, in good farming land in *Tippecanoe* county, or the adjoining counties, or in town lots in *Lafayette*, within two years from date—the lands and lots to be appraised at their fair value by appraisers appointed by the judge of the Probate Court and sheriff of the county for the time being. Breach, that although the time for the payment of said sum, &c., had long since elapsed, yet the defendant had not paid, &c., in the manner specified, or in any other manner. Pleas, 1. That the defendant, on the 8th of *May*, 1847, at, &c., paid to the plaintiffs said 217 dollars and 50 cents in said agreement mentioned, in manner and form as therein specified. Conclusion to the country. 2. That he had at all times, &c., and still held himself in readiness to convey to the plaintiffs a sufficiency of good farming land in *Tippecanoe* county, or the adjoining counties, or town lots in *Lafayette*, fully to pay said sum, but the plaintiffs had never demanded any conveyance, &c. 3. That the plaintiffs had not pointed out or designated to the defendant, or expressed to him a preference for any property to satisfy the agreement. 4. That the plaintiffs had not, at any time, offered the defendant an opportunity to consult with them as to a suitable quantity or

Nov. Term, 1853.

ELLSWORTH v. BUELL.

quantities, or location or locations, of land to satisfy said agreement, &c. 5. That on the 1st of *July*, 1849, the plaintiffs agreed to receive land in discharge of said agreement, and on that day the defendant offered them a sufficiency of land in *Benton* county (describing it) to satisfy said agreement, and also offered to convey the same to them in satisfaction thereof, and they agreed to receive said lands as a settlement; but afterwards refused without cause, &c. Special demurrer to the first plea, assigning, 1. That the plea alleged performance, without stating the special manner, &c. 2. That it should have concluded to the country. General demurrer to the residue of the pleas. *Held*, that the special causes of demurrer to the first plea were well assigned. *Held*, also, that the other pleas were bad. *Held*, also, that the declaration was not objectionable for not alleging that the plaintiffs had been willing to receive the land; to attend and sanction an appraisement of it, and receive any just award that might be made.

Friday, December 23.

ERROR to the *Tippecanoe* Court of Common Pleas.

DAVISON, J.—Covenant by the appellees against the appellant. The declaration contains three counts. There are five pleas to each count. The first count and the pleas filed to it, present all the points made in the case; therefore, the other counts and pleas will not be further noticed.

The first count is upon an agreement under seal, executed by the appellant and one *Henry W. Ellsworth*, on the 8th of *May*, 1845, by which they agreed to pay the appellees 217 dollars and 50 cents, in good farming land in *Tippecanoe* county, *Indiana*, or the adjoining counties, or in town lots in *Lafayette*, within two years from the date of the agreement; said lands and lots to be appraised at their fair value by appraisers appointed by the judge of the Probate Court and sheriff of the county for the time being. The breach is, "And although the time for the payment of said sum of money," &c., "hath long since elapsed, yet the appellant hath not paid," &c., "in the manner specified," &c., "or in any other manner whatever."

Pleas, 1. That the appellant did, on the 8th of *May*, 1847, at, &c., pay to the appellees the said 217 dollars and 50 cents in said agreement mentioned, in manner and form as therein specified. This plea concludes to the country. 2. That he has at all times, &c., held him-

self in readiness to convey to the appellees a sufficiency of good farming land in *Tippecanoe* county, *Indiana*, or the counties adjoining thereto, or town lots in *Lafayette*, fully to pay said sum of money, and still holds himself in readiness to do so; but the appellees have never demanded any conveyance, &c. 3. That the appellees have not pointed out or designated to the appellant, or expressed a preference to him for any property to satisfy the agreement. 4. That the appellees have not, at any time, offered the appellant an opportunity to consult with them as to a suitable quantity or quantities, or location or locations, of land to satisfy said agreement, &c. 5. That on the 1st of *July*, 1849, the appellees agreed to receive land in discharge of said agreement, and on that day he offered them a sufficiency of land in *Benton* county, *Indiana*, (describing it) to satisfy said agreement, and also offered to convey the same to them in satisfaction thereof; and they agreed to receive said lands as a settlement, but afterwards refused, without cause, &c.

Demurrers were sustained to the pleas, and judgment was given for the plaintiffs below.

To the first plea the demurrer was special. It assigns, 1. That the plea alleges performance without stating the special manner, &c.; 2. That it should have concluded with a verification.

These causes are well assigned. This is not a case in which performance, in general terms, may be pleaded. The rule is, that "if there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated." 3 Chitty's Pl. 985, n. 1. By the agreement sued on, the appellant, in effect, stipulated that within a stated period he would cause real estate to be appraised and convey the same to the appellees in payment of their debt. The plea does not specifically aver the performance of these stipulations. Therefore, it is defective on special demurrer. But even if it was in other respects good, still its conclusion is evidently wrong.

The second, third and fourth pleas obviously constitute

Nov. Term, 1853.

THE MADISON INSURANCE CO. v. LOSTUTTER.

no bar to the suit. The fifth sets up a verbal contract entered into between the parties after the period stipulated for performance of the agreement had passed. By this contract, the appellees agreed to receive certain lands in *Benton* county as a settlement, &c. If this new contract had been made before breach of the original agreement, it might have been available as stated. But the plea on its face shows that it was not made until after the time of performance had passed. To make the plea in question a defence to the action, it should have averred that a deed for these lands had been made and received by the appellees in satisfaction of their debt.

But it is said that the declaration is objectionable. It does not allege that the appellees had been willing to receive the land; to attend and sanction an appraisement of it, and receive any just award that might be made. There is nothing in these objections. Neither the terms nor effect of the agreement imposed on them any condition, either express or implied. The time of performance was stipulated, and a demand on the appellant was not requisite. Nor were they required, by the agreement, to do anything relative to the appraisement of the land.

Per Curiam.—The judgment is affirmed with 7 per cent. damages and costs.

J. A. Wilstach, for the plaintiff.

R. C. Gregory and *R. Jones*, for the defendants.

THE MADISON INSURANCE COMPANY *v.* LOSTUTTER.

A release executed by a person to render him competent as a witness, need not be delivered to the releasee, but may be deposited in Court for his use.

The interest of a witness in the question involved in a suit, goes to his credibility merely, and not to his competency.

In a suit by one of several joint owners of a cargo upon a policy of insurance, the other joint owners, to render themselves competent as witnesses, executed to the plaintiff a release of all the interest they might or could have in any judgment that might be recovered in the suit. *Held*, that the instrument was not defective for not purporting to release the insurer from all claim by the releasors for any loss of the property insured.

Where one of several joint owners effects an insurance of his interest in a cargo, the other joint owners are competent witnesses for him in a suit upon the policy.

ERROR to the *Jefferson* Circuit Court.

Friday, December 23.

DAVISON, J.—Covenant by the defendant in error against the plaintiff in error on a policy of insurance. The policy was effected in the name of the plaintiff below, but the cargo insured was owned jointly by him and his three brothers. He claimed to recover only to the extent of his interest in the cargo. Nine pleas were pleaded, upon which there were issues. Verdict and judgment for the plaintiff.

Upon the trial, two of the joint owners, viz., *John* and *Wilson Lostutter*, were, over the defendant's objection, permitted to testify in the cause, they having first executed to the plaintiff a release of all the interest they might or could have in and to any judgment that might be recovered in the suit then on trial. That release was delivered to the plaintiff's counsel, and by them filed in Court. It appears that the policy did not cover the interest of said *John* and *Wilson* in the cargo.

It is contended that these witnesses were improperly admitted to testify in the cause: that the release was insufficient; first, because it was not delivered to the plaintiff; secondly, it should have released the defendant below from all claim by them upon her for any loss of property insured by the policy.

There is nothing in the objections. The release was placed on file in Court. It was there for the use of the plaintiff. He can procure it at any time. And it will constitute a bar to any suit that may be brought against him by the releasors, relative to the judgment in this cause. Mr. *Greenleaf* says, "It is not necessary that the release be actually delivered by the releasor into the

Nov. Term, 1853.

JACKSON v. THE STATE.

hands of the releasee. It may be deposited in Court for the use of the absent party." 1 Greenl. Ev., s. 429.

These witnesses, after they executed the release, could have no interest in the event of the suit. The record could not be used either for or against them in any suit which they might institute against the company. At most, their interest would be, as to the question involved in the suit. Such interest would go to their credibility merely, and not to their competency. "One underwriter may be a witness for another underwriter upon the same policy; or one seaman for another whose claim for wages is resisted, on grounds equally affecting all the crew." 1 Greenl. Ev., s. 389.

But the record shows that the interest of these witnesses in the cargo insured, was not covered by the policy. Such being the case, they were competent without any release.

Per Curiam.—The judgment is affirmed, with 7 per cent. damages and costs.

J. G. Marshall, for the plaintiff.

D. S. Major and *A. Brower*, for the defendant.

JACKSON *v.* THE STATE.

A charge, in an information for gaming, that *A.* lost, &c., upon a game at cards, is not supported by evidence establishing that *A.* and another jointly lost, &c.

Saturday, December 24.

APPEAL from the *Henry* Court of Common Pleas.

ROACHE, J.—Information charging the defendant with having lost, upon a game at cards, the sum of 25 cents to one *John Bigler*.

On the trial *Jackson* offered to prove, by one of the state's witnesses, that the betting was a joint one by him-

self and one *Brown*, and that whatever was lost was lost by them jointly. The Court excluded the evidence.

This was erroneous. A charge that *Jackson* alone lost, &c., was not supported by proof that *Jackson*, with another, jointly lost, &c. A judgment would be no bar to another prosecution against them jointly for the same act.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. Grose, for the plaintiff.

E. B. Martindale, for the state.

Steele *v.* The State, on the complaint of Graham.

An affidavit for surety of the peace alleged that the complainant verily believed and actually feared, &c., that *A. B.* would kill him, or do him great bodily injury, or procure others to do so, &c. *Held*, that the charge was bad for being in the alternative.

ERROR to the *Delaware* Circuit Court.

Saturday, December 24.

Roache, J.—*Graham* made complaint on oath, praying for surety of the peace against *Steele*.

The Circuit Court overruled a motion to quash the affidavit, and upon hearing the evidence, ordered *Steele* to enter into recognizance to keep the peace, &c.

The only question arising upon the record, is as to the sufficiency of the affidavit. The language of the affidavit, so far as it is necessary to quote it to present the point in dispute, is, that the "affiant verily believes and actually fears, and has just cause to fear and apprehend, that the said *Justin Steele* will kill him, said affiant, or do him great bodily injury, or procure others to do so," &c.

This mode of stating the charge violates the familiar rule, well established in civil as well as criminal proceed-

Nov. Term, 1853.

DUNCAN v. BARBOUR.

ings, that pleadings shall not be in the alternative. 1 Chitty Pl. 272.

The affidavit should have been quashed.

Per Curiam.—The judgment is reversed with costs.

W. March, for the plaintiff.

D. Kilgore, *R. A. Riley*, *N. B. Taylor* and *J. Coburn*, for the state.

DUNCAN and Others *v.* BARBOUR and Others.

Saturday, December 24.

ERROR to the *Ripley* Circuit Court.

ROACHE, J.—Bill in chancery by *Barbour* and *Smith*, and *Peter A. White & Co.*, against *Duncan*, *Shook*, and others, for the purpose of subjecting to sale certain premises charged to have been conveyed with intent to defraud the complainants.

The bill alleges that *Barbour* and *Smith* recovered a judgment against *Duncan*, on the 8th of *September*, 1847, for 236 dollars and 61 cents, on a note dated *July* 30, 1846; that *Peter A. White & Co.* also recovered a judgment against *Duncan*, on the 27th of *February*, 1848, for 544 dollars and 47 cents, on two notes dated respectively on the first and second of *December*, 1846; that executions were issued on both judgments, and returned *nulla bona*, before the filing of the bill; that on the 2d of *September*, 1847, *Duncan* conveyed a town lot, which was the only unincumbered property owned by him, subject to execution, to the defendant *Shook;* that said conveyance was made pending the suit of *Barbour* and *Smith*, and long after the date of all the notes above mentioned; that the conveyance was made for the purpose of placing the property beyond the reach of the complainants, and thus fraudulently preventing them from collecting their said

debt; and that *Shook* was cognizant of the fraudulent intent, and participated in it.

The answers admitted the notes, judgments, executions, returns, and the sale by *Duncan* to *Shook*, but denied all charges of fraud, and insisted that the sale was made in good faith, and for a valuable consideration.

Upon the hearing, the Court held the conveyance from *Duncan* to *Shook* to be fraudulent and void, and decreed a sale, pursuant to the prayer of the bill.

The only error alleged for the reversal of this decree is, that it is not sustained by the evidence.

Upon a careful examination of the proof before the Circuit Court, we are satisfied the decree ought not to be disturbed on that ground. We think the conclusion of Court was a fair deduction from the evidence in the case.

The facts and circumstances established by the proof were such as, in our opinion, to justify the Court in finding that the conveyance was made for the purpose of hindering the complainants in the collection of their debts, and that the grantee had full knowledge of that purpose.

Per Curiam.—The decree is affirmed, with 10 per cent. damages and costs.

D. Kelso, for the plaintiffs.

W. M. Dunn, for the defendants.

Louderback *v.* Rosengrant.

Proceeding before a justice of the peace, under the act of 1847, for a writ of *ne exeat*. The affidavit did not contain an allegation that the defendant was taking with him property subject to execution. The defendant having, upon the requirement of the justice, given special bail, afterwards but within thirty days from the decision of the justice, took an appeal to the Circuit Court. The plaintiff, in the Circuit Court, moved to dismiss the appeal. The motion having been overruled, the defend-

Nov. Term, 1853.

LOUDERBACK v. ROSENGRANT.

ant (who had not objected to the affidavit before the justice) moved to dismiss the suit for the omission in the affidavit of said allegation, whereupon the plaintiff interposed a motion to amend by supplying the omitted allegation. *Held*, that the motion to dismiss the appeal was properly overruled. *Held*, also, that the amendment of the affidavit should have been allowed.

Saturday, December 24.

ERROR to the *Huntington* Circuit Court.

PERKINS, J.—*Louderback* procured from a justice of the peace a writ of *ne exeat* against *Rosengrant*, upon an affidavit as follows:

"I, *Daniel Louderback*, do solemnly swear that *Charles Rosengrant* is justly indebted to me in the sum of eighty dollars by note, which note is not yet due; and that I have reason to believe and do verily believe that the said *Charles Rosengrant* is about to remove from this state without leaving sufficient property for the payment or satisfaction of his just debts, or without providing for the performance of his said contract. *Daniel Louderback*."

The constable returned the writ, with the body of the defendant, to the justice, who, after hearing the case, "considered that said defendant remain in custody until he find security," &c.

The defendant thereupon gave special bail for the payment of the debt, or for his appearance to answer to a suit, &c.; and feeling himself aggrieved by the decision of the justice requiring such special bail, he subsequently, but within thirty days, appealed from said decision to the Circuit Court.

The history of the case and the points made and ruled in that Court, are shown by a short bill of exceptions which states, that "upon the calling of the cause the plaintiff moved to dismiss the appeal, because the defendant, on the trial of the cause before the justice, executed and filed his bond conditioned for the performance of the contract, in obedience to the order of the justice, before praying an appeal; which motion the Court overruled. And afterwards the said defendant moved to dismiss the suit, because the affidavit upon which the writ of *ne exeat* issued, did not contain an allegation that the defendant

was taking with him property subject to execution; whereupon the plaintiff interposed his motion for leave to file an amended affidavit, which latter motion the Court overruled, and sustained the motion of the defendant to dismiss," &c.

The defendant was not bound to pray an appeal at any time before actually taking it by filing his bond. The objection first above mentioned, made by the plaintiff, may be treated, therefore, as being that the appeal was taken after the bond in the *ne exeat* proceeding was filed.

We think the Court did right in overruling the motion to dismiss the appeal. The statute authorizing the writ of *ne exeat* (Acts of 1847, p. 80, s. 14), provides that either party may appeal to the Circuit Court from the decision of the justice, as in ordinary cases.

In ordinary cases, a party may appeal from the judgment of the justice at any time within thirty days from its rendition. The privilege is without qualification, except that a bond must be given, and we are not disposed to curtail it by constructive waivers. Should an ordinary judgment before a justice be stayed by putting in bail, or be paid off even, still we think the right of appeal, on the part of the defendant, within the thirty days, would not be lost. The party would not, by those acts, be deprived of the statutory right of testing the correctness of the judgment, and obtaining relief should he procure its reversal in the Supreme Court. It might be out of his power immediately to get security in an appeal, while it might be in his power and necessary to his personal liberty, or the security of his property, to stay execution on the judgment till he could perfect an appeal.

We think the Court erred in refusing to permit the plaintiff to amend his affidavit. The statute relative to appeals generally from justices' judgments, expressly authorizes amendments in the Circuit Court; R. S. 1843, p. 891, s. 171; and, as we have said, the statute of 1847 relative to writs of *ne exeat*, puts appeals from decisions under it on the footing of ordinary ones. The affidavit, in a proceeding of this kind before a justice, like that in

Nov. Term, 1853.

LOUDEN v. BIRT.

a replevin suit, may be regarded as the cause of action. We see no injury that can result from permitting amendments in the Circuit Court in cases under this statute, and, in the present instance, it is entirely equitable that it should be done, as no objection was made to the affidavit at the trial before the justice, where, had objection been made, a corrective could have been applied before the accumulation of costs.

The Court should have sustained the motion of the plaintiff for leave to amend, and, of course, overruled that of the defendant to dismiss, as the amendment would, when made, remove the cause assigned for the dismissal.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Brackenridge, Jr., and *J. R. Coffroth*, for the plaintiff.

J. R. Slack, for the defendant.

LOUDEN *v.* BIRT.

Suit by the assignee against the maker of a promissory note. Pleas, 1. That the note was given for part of the consideration of the purchase of a patent, called, &c., which the seller represented to the defendant would be valuable to him in connection with his trade as a carpenter, and that it was not valuable, &c. 2. That at, &c., it was agreed, &c., that the note should be paid in carpenter work, and that, before the assignment of it, the defendant fully paid the same, according to said agreement. 3. That after the note was executed, it was agreed that the same should be paid in carpenter work, and that, before the assignment thereof, the defendant, in accordance with the terms of said agreement, fully paid and satisfied the same. *Held*, that the first plea was bad; and that the second and third were good, at least upon general demurrer.

In a suit upon a written instrument, a plea which attempts to set up in bar a parol contemporaneous agreement, is bad.

A judgment will not be reversed because an immaterial special plea was not replied to.

The patent act of 1836, requiring the assignment of a patent to be recorded within three months from its execution, is merely directory, and for the protection of *bona fide* purchasers, and does not require the recording of an assignment within that time as a prerequisite to its validity.

Nov. Term, 1853.

LOUDEN v. BIRT.

Saturday, December 24.

ERROR to the *Marion* Circuit Court.

PERKINS, J.—Assumpsit by *Henry Birt* upon a promissory note reading as follows:

"*Indianapolis*, *May* 20th, 1848. Six months after date I promise to pay *J. J. Owsley* and *Jacob Landis*, or order, the sum of fifty-eight dollars and thirty-three cents, for value received, without any relief from valuation or appraisement laws. *A. A. Louden*."

The note shows an assignment on its back to the plaintiff.

The defendant, *Louden*, pleaded—

1. That said note was given for a part of the consideration of the purchase of a "patent called *Morris's* improvement in door-plates," which, it was represented to defendant, would be valuable to him in connection with his business as a carpenter, and that it was not so valuable to him.

2. That at the time of the execution of said note it was agreed between the parties that it should be paid in carpenter work, as requested by the payees, and that defendant had been at all times ready, &c.

3. That at, &c., it was agreed that said note should be paid in carpenter work, and that, before the assignment of it, defendant fully paid the same according to said agreement.

4. That after said note was executed, it was agreed that the same should be paid in carpenter work, and that before the assignment thereof, defendant, in accordance with the terms of said agreement, fully paid and satisfied the same.

5. That said note was given without consideration.

6. That the consideration of the note was as set out in the first plea, and that the payee had no authority to sell said patent right because the assignment of it to him by the original patentee had not been recorded in the office of the secretary of state of the *United States*.

General demurrer sustained to the first, second, third and fourth pleas. Replication to the fifth, that said note was not executed without consideration. The sixth plea

Nov. Term, 1853.

LOUDEN v. BIRT.

was unanswered. The issue of fact upon the fifth plea was tried and found for the plaintiff, and judgment was rendered in his favor for the amount of the note and interest.

The demurrer was rightly sustained to the first plea. That plea attempts to set up fraud, but its allegations fall far below that defence. It states that the consideration of the note was the transfer of a patent right which the seller told the buyer would be of advantage to him in his business as a carpenter, but which was not so. This does not make out a case of fraud. It does not appear that the seller misrepresented, in any particular, the character of the article sold; and whether or not it would be advantageous to the buyer was mere matter of opinion in relation to which he should have been his own judge. And, further, from aught the plea shows, it may have been the negligence or default of the defendant himself that the patent did not prove advantageous to him. The second plea was bad for attempting to set up a parol agreement contemporaneous with the written one from which it differed.

The sixth plea was unanswered; and as to it there was a trial without an issue, which would have been fatally erroneous, under former decisions of this Court, had the plea set up a valid defence. But the point raised by it, viz., the non-recording of the assignment of the patent in the office of the secretary of state of the *United States*, was a perfectly immaterial one, and, hence, no material issue could have been formed upon the plea. The failure to notice such a plea below will not reverse a case in this Court. Formerly, it was necessary to the sustaining of a suit by an assignee, that the assignment of the patent should be recorded in the office of the *United States* secretary of state. *Higgins* v. *Strong*, 4 Blackf. 182.—*Wyeth* v. *Stone*, 1 Story R. 271. But the law requiring such recording was repealed in 1836, and a recording in the patent office substituted. This latter law, according to the decision of Judge *Story* in *Pitts* v. *Whitman*, 2 Story R. 609, "is merely directory, for the protec-

tion of *bona fide* purchasers, without notice, and does not require the recording of an assignment within three months, as a prerequisite to its validity."

The evidence given upon the trial of the issue upon the plea of no consideration, is spread upon the record. The existence of a patent and the assignment of territory, sale, &c., were proved. The evidence is conflicting as to the patent, or invention, being of any value, though it preponderates in its favor. In such a case we cannot reverse a judgment in favor of the plaintiff. See *Hardesty* v. *Smith*, 3 Ind. R. 39.—*Fowler* v. *Swift*, *id.* 188.

It remains to consider the third and fourth pleas. They allege that after the note in suit was executed, and before its assignment, it was agreed between the maker and payees that the same should be paid in carpenter work, and that it had been so paid pursuant to the agreement. Had the general issue been in, the defences set up in these pleas could have been given in evidence, if they existed, under it, and hence the decision against the sufficiency of the pleas on demurrer would have been unimportant. But the record states that the general issue was expressly withdrawn before the trial.

Had the pleas in question shown that the agreement changing the mode of payment of the note, was made before it became due, they would have constituted good bars to the action, under the decision in *Ward* v. *Walton*, at the last term of this Court. (1) But they do not show that such was the fact. They would amount to good pleas of accord and satisfaction, if they contained the averment that the work done was accepted in satisfaction; but they do not contain that averment. They can only be taken to severally amount to this, that after the note in suit, which was payable in money, became due, the payee agreed to take, and the payer to give, carpenter work in payment; and that, in pursuance of that agreement, the note had been fully paid and satisfied in carpenter work; and the question is, is a plea with such and no more averments, a bar to an action on the note?

It has been said that "a plea of payment cannot be

Nov. Term, 1853.

LOUDEN v. BIRT.

supported, unless the payment has been made in money alone." *Sinard* v. *Patterson*, 3 Blackf. 353. But this is not so. Payment may be made in anything that the creditor will accept as payment. And under the general issue, or a general plea of payment, payment in anything that has been accepted, or received as payment, may be proved. And in these cases it is a question for the jury whether what may have been given and received, was a payment or not, in the particular case. This is well settled by modern decisions. See the cases cited in 2 Swan's Pr. 702, 703.—Chitty on Contracts 750.—*Moore* v. *Studden et al.*, Wright's (O.) R. 88.—*Willard* v. *Germer*, 1 Sandf. (N. Y.) R. 50. This being so, it would seem that a plea which averred that payment had been actually made in any manner, should be sufficient. Pleadings must be certain to a common intent. A defendant who sets up payment, or anything else, as a defence, should aver it with that certainty that will inform his adversary and the Court of what is in issue. We see no reason why anything more is required. A plea of payment is not one of those in which it is necessary to set out all the facts, particularly to show that what has been done amounts in law to a payment; but it is sufficient to allege the fact of payment, and it is then determined by the evidence given whether the fact is made out or not. And the very allegation that a debt had been fully paid in a manner stipulated in a previous agreement between the parties, would seem to imply an acceptance of the thing delivered or furnished in payment.

We think the pleas were good, at least upon general demurrer, and that the Court erred in ruling otherwise.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. L. Ketcham and *N. B. Taylor*, for the plaintiff.

H. Brown, for the defendant.

(1) *Ante*, p. 75.

CAROTHERS and Wife *v.* LITTLE and Others.

The meaning of the act entitled "an act to amend article 5, chapter 28, of the Revised Statutes of 1843," approved *January* 21, 1850, is, that in the distribution of the surplus of the personal estate of a deceased husband, after the payment of debts, there shall be given to the widow, where there are no heirs lineally descended, the amount of dowry which she brought to the husband, if the surplus is sufficient for that purpose; and where the surplus exceeds that amount, she shall receive such amount and half of the residue: but where she brought no dowry, she shall have half of such surplus.

ERROR to the *Putnam* Probate Court.

Saturday, December 24.

Per Curiam.—*William Carothers* and *Lurannah*, his wife, petitioned the *Putnam* Probate Court to distribute to them the entire surplus of the estate of *Peter Fellenzer*, deceased, remaining after the debts of said estate had been paid. They set forth that said *Peter* died in *April*, 1850, leaving said *Lurannah* his widow, but leaving no heirs lineally descended, nor father nor mother; that said *Lurannah* subsequently married said *William Carothers*; that said *Peter* left surviving him certain brothers and sisters, who are made defendants; and that the surplus of the personal estate of said *Peter*, after payment of debts, amounts to 1,500 dollars, the money being now in the hands of the administrator. The administrator is made a party.

Answers were filed, admitting the facts stated in the petition, but insisting that said widow was entitled to but one-half of said surplus; and so the Court, on the final hearing, decreed.

The case is governed by the act of the legislature passed the 19th of *January*, 1850, and found on page 70 of the laws of 1850.

That act, construed together, requires, we think, that in distributing the surplus of the personal estate, after the payment of debts, there shall be given to the widow, where there are no heirs lineally descended, the amount of dowry brought to the husband by the widow, if the surplus shall amount to a sufficiency for the purpose; and

Nov. Term, 1853.

THE STATE v. LOCKSTAND.

where the surplus amounts to more, she is to receive the amount of her dowry, and half the excess of the surplus of the estate over her dowry. But where she brought no dowry, she is to take half of the surplus. So the Court below decreed.

The then existing rule of distribution, under the R. S., gave the widow one-half in these cases, and it is not shown, in this case, that the widow brought any dowry to her husband. The law is now different, and this decision is unimportant, except for the determination of this particular case.

The decree below is affirmed with costs.

L. Barbour and *A. G. Porter*, for the plaintiffs.

R. L. Hathaway, for the defendants.

THE STATE *v.* LOCKSTAND.

An information for retailing spirituous liquor without license, was founded upon an affidavit alleging that the defendant did, on, &c., at, &c., unlawfully keep a certain house wherein spirituous liquors were sold, directly and indirectly, without license, in a less quantity than one gallon; and had, by himself and bar-keeper, suffered the same to be drank in and about said house and premises, and sold the same to *A. B.*, to-wit, one drink, &c. *Held*, that the affidavit did not support the information.

An information for retailing spirituous liquor without license, contained no averment of the price for which the liquor was sold. *Held*, that the information was defective.

Saturday, December 24.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Per Curiam.—Information for retailing spirituous liquors without license. The information, on the defendant's motion, was dismissed for want of a sufficient affidavit. The affidavit is set out in the record. It alleges that the defendant did, on, &c., at, &c., unlawfully keep a certain house wherein spirituous liquors are sold, di-

rectly and indirectly, without license, in a less quantity than one gallon; and has, by himself and bar-keeper, suffered the same to be drank in and about said house and premises, and sold the same to *Edward H. Reynolds*, to-wit, one drink, &c.

We are informed by the counsel for the state, that "the affidavit was originally intended for a nuisance case, and when first filed, stood as such." It does not appear to have been changed from its original purpose. Whatever offence the affidavit may charge, it evidently does not support the information. But the information itself is defective. It contains no averment of the price for which the liquor was sold. *The State* v. *Miles*, at the present term.

The ruling of the Court was, therefore correct. The judgment is affirmed. (1)

L. Reilly, for the state.

(1) The judgments in two other cases of *The State* v. *Lockstand* were affirmed, on this day, for the reasons given in this case.

The State *v.* Boyle and Another.

Saturday, December 24.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—This case is similar to *The State* v. *Hurley*, and *The State* v. *Miles*, at the present term, and for the reasons there given, the decision is the same. The judgment is affirmed. (1)

L. Reilly, for the state.

W. F. Lane and *W. C. Wilson*, for the defendant.

(1) The judgments in two other cases of *The State* v. *Boyle et al.* were affirmed, on this day, for the reasons given in this case.

Nov. Term, 1853.

BARKER v. ADAMS.

THE STATE *v.* HURLEY.

Saturday, December 24.

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—Charge, selling liquor without license. Motion to quash sustained, and correctly. See *Divine* v. *The State*, *ante*, p. 240.—*The State* v. *Lockstand*, *ante*, p. 572.—*Rosenbaum* v. *The State*, *post*; and *Brutton* v. *The State*, *post*.

The judgment is affirmed.

L. Reilly, for the state.

D. Mace and *W. C. Wilson*, for the defendant.

BARKER *v.* ADAMS.

The statute of limitations of 1843 does not bar actions on judgments of a court of record, which have been rendered 20 years; but only raises a presumption of payment by lapse of time.

Where a plea is substantially defective, a demurrer to the replication to the plea should be overruled.

Saturday, December 24.

ERROR to the *Dearborn* Circuit Court.

DAVISON, J.—Debt by the plaintiff in error against the defendant upon a judgment of a court of record held within and for the county of *Orange*, and state of *Vermont*. Pleas, 1. *Nil debet*. 2. *Nul tiel record*. 3. Payment. 4. That said action was not brought within twenty years after the rendition of said judgment. 5. That the cause of action did not accrue within twenty years next before the commencement of this suit, &c. Demurrer to the first plea sustained. Replications in denial of the second and third pleas. To the fourth and fifth the plaintiff replied, that just before the rendition of said judgment, the

defendant absconded from the state of *Vermont* (where the plaintiff then, and at all times since, has resided) and ever since hath been and remained without said state, &c. Demurrer to this replication sustained. Judgment for the defendant.

The plaintiff does not insist upon the validity of his replication, but contends that the fourth and fifth pleas constitute no defence to the action.

That position is well taken. The judgment sued on is of a court of record. Hence, the pleas in question are not applicable to the suit. In *Reddington* v. *Julian*, 2 Ind. R. 224, it was held, that "the statute of limitations does not bar actions on judgments which have been rendered twenty years; but only raises a presumption of payment by lapse of time." R. S. 1843, c. 40, s. 121. The fourth and fifth pleas being substantially defective, the demurrer to the replication, on that account, should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the plaintiff.

D. S. Major and *A. Brower*, for the defendant.

Watts and Others *v.* Palmer.

Bill to foreclose a mortgage upon premises a part of which had been aliened after the execution of the mortgage, but before the filing of the bill. Decree for the sale of the whole premises. The record did not show that the part of the lot not aliened was sufficient to discharge the amount of the decree and costs, nor that the Court improperly exercised its power in decreeing the sale of the whole. *Held*, that under the R. S. 1843, the decree was not objectionable.

Nov. Term, 1853.

WATTS v. PALMER.

Saturday, December 24.

ERROR to the *Dearborn* Circuit Court.

DAVISON, J.—Bill in chancery to foreclose a mortgage. The bill alleges, *inter alia*, that *George W. Palmer* sold and conveyed to one *Benjamin Mayhew* a lot of ground in *Lawrenceburgh*. To secure a part, viz., 100 dollars, of the purchase-money thereof, *Mayhew* executed and delivered a mortgage to *Palmer*, to foreclose which the bill was filed. It is further alleged, that after the execution of the mortgage, *Mayhew* conveyed the one undivided half to *Squire Watts*, one of the plaintiffs in error, who, at the time of the conveyance to him, had full knowledge of the mortgage. *Mayhew* died intestate before the commencement of this suit, leaving his wife, who is a defendant to the bill, and four minor children, his only heirs, who are also defendants.

The record shows that process was served upon all the defendants. The minors answered by their guardian *ad litem*. The other defendants made default, and a decree *pro confesso* was entered against them. The Court, on final hearing, ordered the lot in question to be sold, &c., for the payment of the debt, &c.

It is contended that the Court erred by ordering the whole of the premises to be sold, &c.; that a part of them had been aliened, and the decree should have ordered the part not aliened to be first offered for sale, &c. The law applicable to the question thus presented is in the R. S. 1843, c. 29, s. 33: "Whenever a bill shall be filed for the foreclosure or satisfaction of a mortgage, the Court shall have power to decree a sale of the mortgaged premises, or such parts thereof as may be sufficient to discharge the amount due on the mortgage and the costs of suit," &c. The Court, in accordance with the power thus given, ordered the whole of the mortgaged premises to be sold. There is nothing in the record tending to show an improper exercise of that power in the case before us. Had it appeared by proof satisfactory to the Court, that the part of the lot not aliened was sufficient to discharge the amount due and costs, this case might present a different

question. But it does not appear that the premises were worth more than the debt. 3 Blackf. 403.—3 Ind. R. 401.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

P. L. Spooner, for the plaintiffs.

N. T. Hauser, for the defendant.

SMITH *v.* ADAMS.

Saturday, December 24.

ERROR to the *Dearborn* Circuit Court.

Per Curiam.—The judgment in this case is reversed with costs, and the cause remanded, for the reasons given in the case of *Barker* v. *Adams*, at the present term. (1)

J. Ryman, for the plaintiff.

A. Brower, for the defendant.

(1) *Ante*, p. 574.

THE STATE *v.* MILES.

An information, under the R. S. 1852, must contain all the substantial requisites of an indictment at common law.

An information for retailing spirituous liquor which does not allege a price for which the liquor was sold, is bad.

Saturday, December 31.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Per Curiam.—This was an information for retailing spirituous liquors without license. The information al-

Nov. Term, 1853.

SNYDER v. DEGANT.

leges that the defendant, on, &c., at, &c., did unlawfully sell and retail spirituous liquors, directly and indirectly, without license, in a less quantity than one gallon, and sold the same to one *Ralph Heath*, to-wit, one drink, &c.

Upon the defendant's motion, the information was quashed.

We think the Court ruled correctly. The information contains no allegation of the price for which the liquor was sold. Without such averment, the facts constituting the offence are not properly stated. The information "must be direct and certain as it regards the party and the offence charged." R. S. 1852, vol. 2, p. 367. In our opinion, it must contain all the substantial requirements of an indictment at common law. We have decided that an indictment is defective for not alleging the price for which the liquor was sold. *Divine* v. *The State*, *ante*, p. 240. The judgment is affirmed.

L. Reilly, for the state.

W. C. Wilson and *W. F. Lane*, for the appellee.

SNYDER *v.* DEGANT.

In slander for words charging the plaintiff with perjury in his testimony given at a trial, it is a sufficient defence to show that the plaintiff was not sworn at the trial.

Saturday, December 31.

APPEAL from the *Decatur* Circuit Court.

Per Curiam.—Action on the case for slander. The only question presented here arises on an instruction asked for by *Snyder*, the defendant below, and refused.

The ninth count of the declaration alleges that there had been a trial between the parties to this suit, before one *Magness*, a justice of the peace, who had ample authority, jurisdiction, &c., and that speaking of that trial,

the said *Snyder* "spoke and published of and concerning the said plaintiff, and of and concerning the said trial before the said justice, the false, scandalous and defamatory words following," &c. Then follow various sets of words imputing perjury. The count concludes by averring that by the speaking and publishing the words in that count, *Snyder* intended to charge *Degant* with having committed perjury on the trial before the said justice.

On the trial it was proved that *Degant* was not sworn and did not give evidence on the trial before the justice mentioned in the declaration. The defendant asked the Court to instruct the jury, that if satisfied that *Degant* was not sworn on the said trial described in the declaration, and all the words proved were spoken referring to that trial, it was not slanderous, and they should find for the defendant.

Held, that the instruction should have been given.

If it appeared that the words were spoken with reference to the trial described in the declaration, it was a good defence to show that the plaintiff could not have committed legal perjury on that trial.

Words charging perjury to have been committed before an officer not having authority to administer oaths, are not actionable, for the reason that the party could not have been legally sworn. *Oram* v. *Franklin*, 5 Blackf. 42.—*Brite* v. *Gill*, 2 Mon. 65.—*Clark* v. *Ellis*, 2 Blackf. 8. The same reason applies when he was not sworn at all. (1)

The judgment is reversed with costs. Cause remanded, &c.

A. Davison, for the appellant.

J. S. Scobey and *J. Ryman*, for the appellee.

(1) DAVISON, J., having been concerned as counsel, was absent.

Nov. Term, 1853.

Ledley v. The State.

The Board of Trustees of the County Seminary of Tippecanoe County v. Lockwood.

Saturday, December 31.

ERROR to the *Tippecanoe* Court of Common Pleas.

Per Curiam.—The judgment is affirmed with costs.

Z. Baird, for the plaintiffs.

R. C. Gregory and *H. W. Chase*, for the defendant.

Wort v. Scott.

Saturday, December 31.

ERROR to the *Jackson* Circuit Court.

Per Curiam.—Disseizin. Recovery below by the plaintiff. The trial was upon the general issue. There is no bill of exceptions, and no brief by the plaintiff in error. We do not know, and see no reason why, the case should be here. The judgment is affirmed with costs.

J. G. Marshall for the plaintiff.

H. P. Thornton and *F. Emerson*, for the defendant.

Ledley v. The State.

4b 580
134 654
4b 580
139 537
4c 580
144 257
4 580
Case 3
168 619
168 623

A party exepting under s. 325, p. 112, vol. 2, R. S. 1852, to the refusal of the Court to give instructions asked, must, by himself or his attorney, sign the memorandum "refused and excepted to" written at the close of each of such instructions.

Section 325, p. 112, vol. 2, R. S. 1852, applies only to civil cases.

The R. S. 1852 were not in force in *March*, 1853.

Exceptions to instructions must, under the practice prior to the R. S. 1852, have been taken at the time they were given, or they were unavailable.

Saturday, December 31.

APPEAL from the *Montgomery* Circuit Court.

STUART, J.—Indictment for rape, taken by change of venue from *Tippecanoe* to *Montgomery* county. Pleas, not guilty and former acquittal. Trial by jury, verdict of guilty, motion for a new trial overruled, and judgment on the verdict. The evidence is made part of the record.

A series of propositions in relation to rape, headed "instructions asked by defendant," some of them marked in the margin "refused," and others not, signed by defendant's attorneys, are set out; and immediately following it is noted, that the following instructions were given in modification of those asked by the defendant. Then follow several legal propositions on the same subject, signed by the circuit judge. The object seems to have been to make up the record under section 325, 2 vol. R. S. 1852, page 112. The memoranda at the close, "refused and excepted to," must be signed by the party or his attorney, to bring him within the rule of practice prescribed in that section, and relates to civil cases. For criminal cases, *vide ibid.* 377. But the R. S. of 1852 were not in force at the time of the trial, *March*, 1853. *Jones* v. *Cavins*, at the present term. (1) Under the old practice, the presentation of the instructions is equally defective. No exception appears to have been taken to them at the time. They can only be regarded as unnecessarily inserted by the clerk in the transcript—forming no part of the record. The questions sought to be raised by the instructions are not, therefore, judicially before the Court.

The plea of former acquittal is wholly untenable. It appears that *Ledley*, prior to the change of venue, had been tried and found guilty in the *Tippecanoe* Circuit Court on the same indictment. At his instance a new trial was granted and the venue changed to *Montgomery*. There the plea of former acquittal was put in. The indictment contains but one count. What the plea means by an implied second count we cannot easily see. Had the indictment contained two counts, on one of which he had been acquitted and on the other convicted, and a new trial had been granted, there might have been some plau-

Nov. Term, 1853.

LEDLEY v. THE STATE.

sibility in the plea. But as the record appears, the plea is a nullity, and if the Court treated it as such, no error was committed.

The evidence is too revolting to be detailed. There are certainly some very strong facts against the prisoner, tending to show his guilt, and from which a jury might draw such inference. The prosecuting witness stands wholly unimpeached, except some discrepancies between her evidence on the trial and that on the preliminary examination, which are to some extent explained. Otherwise, the defence did not attempt to assail either her truth or chastity. Some parts of her evidence seem improbable, and some parts of her conduct are not to be reconciled with the vigorous resistance of a virtuous female under such circumstances. But that, too, is to some extent explained by her position in the prisoner's family. What seemed contradictory in her several examinations, or inconsistent in her conduct, might have been accounted for in the minds of the jury by that species of moral duress which the evidence tends to show that the prisoner exercised over her. She was young—only sixteen—and seemingly artless, wholly inexperienced, and by no means intelligent. She came to the county as a member of the prisoner's family. That was her only home—he and his wife her only friends. To every one else she was comparatively a stranger. Her character was imbecile and inefficient; his decided and impulsive. Under such circumstances his influence over her must have been great. Her conduct, therefore, about the time of the alleged crime and afterwards, should not be measured by any very high standard. His house was distant from others, resistance to his mandates futile, she had no friend with whom to seek an asylum. Hence, if she did not scream nor actively resist, nor rush from his house the moment he released her, nor disclose the outrage to the first person she met, his position and influence might satisfactorily account for it in the minds of the jury.

The evidence further shows that she did "tell Mrs. *Sheets* and Miss *Sheets* the first chance she had." She also told

Mrs. *Rock*. One of these, Mrs. *Sheets*, was a witness for the defence, but no attempt was made to impeach or contradict the prosecutrix.

On the subject of resistance, a recent writer says, that if resistance is overcome by physical force, or her will overpowered by the fear of death, or by duress, the crime is complete, though she ceased all resistance before the act itself was finally consummated. 3 Greenl. Ev. 193. She parts with her virtue as a traveller with a pistol at his breast parts with his purse. In both cases the will is overpowered. It may be a voluntary muscular act, but not a free-will act. They submit to their fate against their will, but voluntarily for fear of worse. Courts cannot fastidiously expect every female to prefer death to violation, and her demeanor on such trying occasions, whether of tame submission or active resistance, is a circumstance for the jury to consider.

Though from the evidence we might not have found the same verdict had we sat on the jury, yet we do not feel at liberty to disturb it. *Weinzorpflin* v. *The State*, 7 Blackf. 186. The jury saw the witnesses and the parties. They have come to a conclusion which, in our view of the case, is perhaps supported by the evidence. We are the more reconciled to it, that there have been two verdicts of guilty, one in *Tippecanoe* county, the other in *Montgomery;* and that the circuit judge who presided at the second trial approved the conviction by overruling the motion for a new trial. Unless we respect such verdicts there would be little hope of bringing the guilty to punishment.

Per Curiam.—The judgment is affirmed with costs.

D. Newell and *E. A. Greenlee*, for the appellant.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

(1) *Ante*, p. 305.

Nov. Term, 1853.

Owsley v. Barbour.

Owsley and Another *v.* Barbour and Others.

A bill praying for discovery merely need not be sworn to; but when the complainant seeks, in addition to the discovery, to stay proceedings in a suit at law, he must support the allegations of the bill by an affidavit of their truth.

Saturday, December 31.

APPEAL from the *Marion* Circuit Court.

Roache, J.—Assumpsit on a promissory note. Before going into trial, the defendants below filed a bill of discovery, in which, after setting forth the facts constituting their defence, and alleging that they knew of no other witness by whom they could as well prove the facts, they prayed that proceedings in the cause should be stayed until the said plaintiffs in the suit at law should appear and testify as witnesses in the cause.

On filing the bill the defendants offered to give bond to the acceptance of the Court, and asked that the action at law should be continued until the witnesses could be produced in Court. The Court refused to continue the cause unless the defendants would make oath of the truth of the facts set forth in the bill of discovery. This they refused to do, and the Court proceeded with the trial, which resulted in the judgment against the defendants below, from which this appeal is taken.

A bill praying for discovery merely need not be sworn to. Mitf. Eq. Pl. 66. But when the party seeks, in addition to the discovery, to stay proceedings in a suit pending at law, he must support the allegations of the bill by an affidavit of their truth. 3 Dan. Ch. Pr. 1820.—*Appleyard* v. *Seton*, 16 Vesey 223.—Drewry on Inj. 376.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

S. Major, for the plaintiffs.

W. Henderson and *W. A. McKenzie*, for the defendant.

Nov. Term, 1853.

Owsley and Another *v.* Barbour and Others.

Rankin v. Harper.

APPEAL from the *Marion* Circuit Court.

Saturday, December 31.

Roache, J.—The point involved in this case is the same, and arises on a similar state of facts to that presented in the case of *Owsley* and Others *v. Barbour* and Others, decided at the present term, (1) and for the reasons there given, the judgment of the Court below is affirmed, with 1 per cent. damages and costs.

S. Major, for the appellant.

W. Henderson and *W. A. McKenzie*, for the appellee.

(1) *Ante*, p. 584.

Rankin *v.* Harper.

A defendant may elect between claiming a set-off or recoupment in an action brought against him, and bringing a cross action for his demand. If he elects to bring the cross action, he is bound by that action, at least till he abandons it by dismissing his suit.

ERROR to the *Kosciusko* Circuit Court.

Saturday, December 31.

Perkins, J.—Bill by *Harper* against *Rankin* for the foreclosure of a mortgage. *Rankin* answered setting forth that the mortgage was given to secure the payment of the last instalment of the purchase-money for the land embraced by it; that the purchase was made by him of *Harper*, on the representations of the latter as to quantity, quality, &c.; that the representations were false, and that he was entitled to a large deduction, one equal to the balance due, from the agreed price, &c.

Nov. Term, 1853.

Owsley v. Barbour.

Owsley and Another *v.* Barbour and Others.

A bill praying for discovery merely need not be sworn to; but when the complainant seeks, in addition to the discovery, to stay proceedings in a suit at law, he must support the allegations of the bill by an affidavit of their truth.

Saturday, December 31.

APPEAL from the *Marion* Circuit Court.

Roache, J.—Assumpsit on a promissory note. Before going into trial, the defendants below filed a bill of discovery, in which, after setting forth the facts constituting their defence, and alleging that they knew of no other witness by whom they could as well prove the facts, they prayed that proceedings in the cause should be stayed until the said plaintiffs in the suit at law should appear and testify as witnesses in the cause.

On filing the bill the defendants offered to give bond to the acceptance of the Court, and asked that the action at law should be continued until the witnesses could be produced in Court. The Court refused to continue the cause unless the defendants would make oath of the truth of the facts set forth in the bill of discovery. This they refused to do, and the Court proceeded with the trial, which resulted in the judgment against the defendants below, from which this appeal is taken.

A bill praying for discovery merely need not be sworn to. Mitf. Eq. Pl. 66. But when the party seeks, in addition to the discovery, to stay proceedings in a suit pending at law, he must support the allegations of the bill by an affidavit of their truth. 3 Dan. Ch. Pr. 1820.—*Appleyard* v. *Seton*, 16 Vesey 223.—Drewry on Inj. 376.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

S. Major, for the plaintiffs.

W. Henderson and *W. A. McKenzie*, for the defendant.

OWSLEY and Another *v.* BARBOUR and Others.

APPEAL from the *Marion* Circuit Court.

Saturday, December 31.

ROACHE, J.—The point involved in this case is the same, and arises on a similar state of facts to that presented in the case of *Owsley* and Others *v. Barbour* and Others, decided at the present term, (1) and for the reasons there given, the judgment of the Court below is affirmed, with 1 per cent. damages and costs.

S. Major, for the appellant.

W. Henderson and *W. A. McKenzie*, for the appellee.

(1) *Ante*, p. 584.

RANKIN *v.* HARPER.

A defendant may elect between claiming a set-off or recoupment in an action brought against him, and bringing a cross action for his demand. If he elects to bring the cross action, he is bound by that action, at least till he abandons it by dismissing his suit.

ERROR to the *Kosciusko* Circuit Court.

Saturday, December 31.

PERKINS, J.—Bill by *Harper* against *Rankin* for the foreclosure of a mortgage. *Rankin* answered setting forth that the mortgage was given to secure the payment of the last instalment of the purchase-money for the land embraced by it; that the purchase was made by him of *Harper*, on the representations of the latter as to quantity, quality, &c.; that the representations were false, and that he was entitled to a large deduction, one equal to the balance due, from the agreed price, &c.

Nov. Term, 1853.

RANKIN v. HARPER.

The bill in the case was filed in *March*, 1847, and the answer on the 29th of *April* of the same year.

The plaintiff replied by way of a plea to this answer, that on the 5th day of *April*, 1847, the said defendant commenced an action at law against the plaintiff to recover damages for the identical misrepresentations, &c., set up in his answer to the bill in this case, which action was still pending, &c.

Depositions were on file, and the whole cause seems to have been referred to the Court upon the plea, as it may be called, to the answer. The Court seems to have sustained the plea, excluded the defence set up in the answer, and decreed for the plaintiff the amount of his demand.

This was right. A defendant may elect between claiming a set-off or recoupment in an action brought against him, and bringing a cross action for his demand. He is bound by his election, at least till he shall abandon it by dismissing his first suit. Here he elected to bring a cross action, and adhered to it by continuing that action.

In *Sherwood* v. *Hammond*, 4 Blackf. 504, wherein the defendant sought to set up in defence a claim for which he had brought a cross action, the Court say:

"*Hammond*, by attempting to set off his account against the demand of *Sherwood* before the justice, became a *quasi* plaintiff; and we must view the question in the same light as if he had brought two actions in the Circuit Court [to which the cause before the justice had been appealed] for the same cause. The pendency of that which was first commenced might have been pleaded in abatement of the other; but not *e converso*."

This is in point.

We have no doubt, on the evidence, that *Rankin* is entitled to redress against *Harper*, but he must seek and doubtless will obtain it, through the channel he selected first, viz., his suit at law.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

O. H. Smith, *S. Yandes* and *J. B. Chapman*, for the plaintiff.

Bembridge and Another *v.* Stoddard.

Action upon a written agreement whereby the defendant agreed to deliver to the plaintiffs a specified quantity of merchantable shelled corn, at *Lafayette*, within a designated period and for a specified price. Plea, that at the time of making the agreement, the plaintiffs agreed in writing with the defendant, that in consideration that the defendant would deliver to them at *Lafayette* said quantity of merchantable shelled corn, they would pay to the defendant said price per bushel, and furnish the defendant a thresher to thresh the corn, for 1 cent a bushel; and that they failed and refused, on request, to furnish the thresher, whereby the defendant was disabled from performing his contract, &c. *Held*, that the plea was sufficient.

Saturday, December 31.

ERROR to the *Montgomery* Circuit Court.

Perkins, J.—*Bembridge* and *Mix* sued *Stoddard* for the breach of an agreement reading as follows:

"Know all men by these presents that I, *Oren Stoddard*, of the county of *Montgomery* and state of *Indiana*, have this day sold to *Bembridge* and *Mix*, of *Lafayette*, *Tippecanoe* county, and state aforesaid, fifteen hundred bushels of good, sound, merchantable shelled corn, to be delivered in the warehouse of the said *Bembridge* and *Mix* in *Lafayette*, on or before the first day of *October* next, for which the said *Bembridge* and *Mix* do agree to pay the said *Oren Stoddard* twenty cents per bushel for said fifteen hundred bushels; and the said *Bembridge* and *Mix* do further agree to give to the said *Oren Stoddard* the privilege of putting into the warehouse aforesaid, two thousand bushels at the same rate per bushel, as witness our hands and seals this 17th day of *September*, 1846."

Nov. Term, 1853.

Rush v. McCoskry.

The defendant pleaded that at the time of making said agreement, the plaintiffs agreed in writing with the defendant, that in consideration that he would deliver to them at their warehouse in *Lafayette* the fifteen hundred bushels of shelled corn above mentioned, they, the plaintiffs, would pay said defendant 20 cents a bushel therefor, and would furnish to the defendant "a thresher to thresh said corn for one cent a bushel;" and that they failed and refused, on request, to furnish said thresher, whereby the defendant was disabled to perform his contract, &c.

Demurrer to this plea overruled, and final judgment for the defendant.

The decision of the Court below was right.

Taking the allegations in the plea to be true upon the demurrer, the furnishing of the thresher is shown to have been a part of the consideration of the sale of the corn, and a condition precedent to its delivery. The failure of the plaintiffs to perform that condition, excused the defendant from performing his agreement; and, indeed, probably disabled him to make performance. See *Coe* v. *Smith*, 1 Ind. R. 267.

Per Curiam.—The judgment is affirmed with costs.

H. S. Lane and *S. C. Willson*, for the plaintiffs.

J. E. McDonald and *H. E. Carter*, for the defendant.

Rush *v.* McCoskry and Another.

The Supreme Court will not disturb the finding of a jury where the evidence is conflicting.

Saturday, December 31.

ERROR to the *St. Joseph* Circuit Court.

Perkins, J.—Debt by *Rush* the payee, against *McCoskry* and another, the makers of a promissory note.

Pleas, 1. *Nil debet.* 2. That the note was given to the payee upon an agreement whereby he undertook, for that sum, to furnish *Rush*, one of the makers, a conveyance and support for and during a journey to *California;* that he did not furnish them, and that, therefore, the consideration of the note had failed.

Replication to this second plea, that the consideration of the note had not failed, &c.

Jury trial, verdict for the defendants, motion for a new trial overruled, and final judgment on the verdict.

The instructions of the Court are not upon the record. The evidence appears in the transcript. It all went to the jury without objection; and the only question, therefore, that can be here raised in regard to it is, whether the verdict is sustained by it; in other words, whether the Court below erred in refusing to grant a new trial on the weight of the evidence.

It is conflicting, and, hence, was for the jury alone to reconcile and weigh. The cause, therefore, must go off our docket under the formula that every term accompanies so many that are improperly placed upon it, in a like fate: "In such a case we cannot disturb the finding of the jury. The judgment below is affirmed with costs, to be certified."

Per Curiam.—The judgment is affirmed with costs.

J. A. Liston, for the plaintiff.

E. B. Crocker, for the defendants.

THE STATE *v.* VOSHALL and Others.

An indictment for a riot, after describing the time and place of the commission of the offence presented, charged that *A. B.*, *C. D.*, and *E. F.* riotously, routously and unlawfully gathered and assembled together, and then and there did riotously, &c., make a great noise, tumult and

Nov. Term, 1853.

THE STATE v. VOSHALL.

disturbance, to the terror of the citizens, &c., contrary, &c. *Held*, that the words were sufficiently descriptive of a riot.

The day and year when an offence is charged in an indictment to have been committed, should be expressed in the indictment at full length, and not in figures.

Saturday, December 31.

ERROR to the *Ripley* Circuit Court.

DAVISON, J.—Indictment for a riot. The indictment charges that the grand jurors empannelled and sworn in the *Ripley* Circuit Court to inquire in and for the body of the county of *Ripley*, upon their oath present that on the 29th day of *August*, in the year 1850, at the county aforesaid, *Frank Jobe*, *John Murphy* and *James P. Voshall* riotously, routously and unlawfully gathered and assembled together, and then and there did riotously, &c., make a great noise, tumult and disturbance, to the terror of the citizens, &c., contrary, &c.

Upon the defendants' motion, the indictment was quashed. It is contended that no offence against the statute is charged in the indictment. We are not of that opinion. The charge is, that "the defendants assembled," &c., "and then and there made a great noise, tumult and disorder, to the terror of the citizens," &c. This sufficiently describes an unlawful act of violence done to the terror of the citizens, which is obviously a riot. *Bankus* v. *The State*, *ante*, p. 114.

But there is one objection to the indictment which must prevail. The date of the commission of the offence is set out in figures. "The day and year when an offence is charged in an indictment to have been committed, should be expressed in the indictment in full length, and not in figures." *Finch* v. *The State*, 6 Blackf. 533.

Per Curiam.—The judgment is affirmed.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

J. W. Gordon, for the defendants.

Nov. Term, 1853.

MAJOR v. McLESTER.

4 591
149 638

MAJOR and Another *v.* McLESTER.

The plaintiffs sued the defendant upon a special agreement, and also upon a *quantum meruit*, for services rendered by them as attorneys at law. The evidence showed that the plaintiffs had agreed with the defendant to commence and prosecute a suit for her to set aside a deed executed by her to one *A.*, and that if the deed should be set aside she was to pay them for their services 150 dollars, but if it should not be set aside, she was not bound to pay them anything. The plaintiffs had accordingly commenced and prosecuted the suit, and the Court upon the final hearing set aside the deed as to part of the property conveyed by it, but confirmed it as to the residue. *Held*, that the defendants could not recover anything on a count upon the special agreement; but that, upon the *quantum meruit*, the plaintiffs were entitled to recover an amount equal to the benefit received by the defendant from their services, not exceeding the sum agreed upon for an entire performance of the contract.

ERROR to the *Dearborn* Circuit Court.

Saturday, December 31.

DAVISON, J.—Assumpsit by the plaintiffs in error against the defendant for services rendered by them as attorneys at law. The declaration contains three counts—a count upon a special contract, on a *quantum meruit*, and upon an account stated. Plea, *non assumpsit*.

The cause was submitted to the Court by consent. The Court found for the defendant. Motion for a new trial overruled, and judgment on the finding of the Court.

The evidence is set out in the record. It shows that it was agreed between the plaintiffs and the defendant that they were to commence and prosecute, in her behalf, a suit in chancery. The object of the suit was to set aside a deed executed by her to one *Susan Ward*. The agreement stipulates that if said deed was set aside, for their services in this suit she was to pay them 150 dollars; but if it was not set aside, she was not bound to pay them anything. The proof was, that pursuant to said agreement, they commenced and prosecuted such suit to final decree in the Circuit Court and final decision in the Supreme Court; that the deed, as to part of the property which it conveyed, was set aside, but confirmed as to the

Nov. Term, 1853.

Major v. McLester.

residue. The value of the land recovered by the suit was 400 dollars; the remainder, as to which the deed was sustained, was worth 700 dollars. The defendant is in the use and possession of the premises, and the services of the plaintiffs, in the prosecution of the suit, were reasonably worth 75 dollars.

The avoidance of the deed to *Susan Ward* was evidently a condition precedent. Until that act was done, the plaintiffs could not recover for their services the sum stipulated in the agreement. The deed in part was set aside, but that was not a performance of the condition. "An agreement must be performed according to its terms as understood and assented to by the parties." Story on Cont. 404. The expressions used in the contract, viz., "if the deed was set aside," must be construed to mean the avoidance of the whole deed. This was the plain and obvious intention of the parties. It follows that there can be no recovery on the special count.

But it is said that the plaintiffs are entitled, on the *quantum meruit*, to recover an amount equal to the benefit received by the defendant from their services, not, however, to exceed the amount agreed on for an entire performance of the contract. This position is well taken. It is in accordance with the principle laid down in *Lomax* v. *Bailey*, 7 Blackf. 599, and adhered to by repeated adjudications of this Court. It is thus stated: "Where one one party to a special entire contract has not complied with its terms, but professing to act under it, has done for or delivered to the other party something of value which he has accepted, no action will lie on that contract for the work done or thing delivered; but the party who has been thus benefited by the labor or property of the other, shall be responsible on an implied promise arising from the circumstances, to the extent of the value received by him." In the case before us, the plaintiffs acted under the special contract. Their services were of substantial benefit to the defendant. She recovered real estate worth, at least, 400 dollars, and is in the possession and use of it. Under the circumstances of this case, it

would be unjust that she should enjoy property acquired by their services, without rendering a compensation.

We think that the plaintiffs, under the count upon a *quantum meruit*, are entitled to recover. *Coe* v. *Smith*, Administrator, *ante*, p. 79.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Major and *A. Brower*, for the plaintiffs.

E. Dumont, for the defendant.

Hussey *v.* McGilpin.

A motion was made in the Circuit Court prior to the act of 1851, to suppress depositions, and overruled; but the objection relied upon was not shown by the record. *Held*, that it must be presumed that no objection was pointed out, and, hence, that the ruling of the Court was right.

APPEAL from the *Hendricks* Circuit Court.

Saturday, December 31.

Stuart, J.—Assumpsit on an agreement between *Hussey* and *McGilpin*, that the former should deliver to the latter, at *Hussey's* farm, one hundred head of steers, weighing not less than one thousand two hundred pounds each on foot, at 1 dollar and 75 cents per hundred pounds. *McGilpin* advanced 50 dollars to *Hussey* on the contract. Plea, the general issue, and, as to the 50 dollars, a tender. The cause was submitted to a jury; verdict and judgment for the plaintiff below. A motion for a new trial was overruled; but the bill of exceptions does not profess to set out all the evidence.

Several objections are urged by counsel for *Hussey*. It is said the motion to suppress depositions was erroneously overruled. The ground of objection relied upon in the Circuit Court not being shown by the record, we must

Nov. Term, 1853.

NEAL v. PRESSELL.

presume that there was none pointed out, and so, that the ruling of the Circuit Court was correct. *Camden* v. *Doremus*, 3 How. R. 515.—*Parker* v. *The State*, 8 Blackf. 292. The trial was prior to the statute of 1850–51.

The instructions given are complained of. But where the record does not set out the evidence, and the instructions given would, under any presumed state of facts, be correct, the judgment will not be reversed. *Collis* v. *Bowen*, 8 Blackf. 262.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

H. Brown and *C. C. Nave*, for the appellant.

J. S. Harvey, for the appellee.

NEAL and Others *v.* PRESSELL and Another.

Where land of a judgment-debtor is sold at sheriff's sale to satisfy the judgment, the record is constructive notice of all the proceedings under the judgment.

A judgment-debtor whose land was levied upon by an execution, procured a third person to bid off the land at the sheriff's sale, with a privilege to him to redeem, &c., and afterwards continued in possession. *Held*, that his possession was not adverse as to the purchaser.

Saturday, December 31.

APPEAL from the *Marion* Circuit Court.

STUART, J.—*Andrews* filed his bill in chancery against *Neal* and *Pressell*, alleging that in 1840 one *Gregg* had recovered a judgment at law in the *Marion* Circuit Court against *Pressell* for 57 dollars and 28 cents, on the transcript of a justice, and execution awarded accordingly, which was levied on part of lot 7 in square 28 in *Indianapolis*, as the property of *Pressell*. On the morning of the sale, *Pressell* agreed with the defendant *Harlan*, that he should bid off the property at sheriff's sale for 110 dollars, and *Pressell* would, in a given time, redeem, &c. *Harlan* purchased accordingly and received a deed, and afterwards conveyed to *Andrews*, with a full knowledge on the part of *Andrews* of all the facts. Subsequently

Pressell conveyed to *Neal* with constructive knowledge, at least, on the part of *Neal*, of the several matters of record, judgment, execution, sheriff's sale, &c.

It should be further stated that *Pressell* tendered the money in due time to *Harlan* and demanded a deed; and that *Pressell* was in possession at the time of the sheriff's sale, and so continued for some time thereafter.

These are the material facts of the case as gathered from the whole record.

The bill prays that *Neal* may be enjoined from further prosecuting his action of ejectment, &c., and that the deed to *Neal* be set aside, &c. The decree of the Court is, that *Harlan's* deed be set aside, and that *Andrews* have a lien on the lot for 110 dollars and interest.

It is claimed that *Neal* was an innocent purchaser, &c. The record was constructive notice of all the proceedings under the judgment.

It is further claimed that *Harlan* was a mere trustee, &c. That is just what the decree has substantially made him in the person of *Andrews* his vendee with notice. 7 Blackf. 249.—4 *id.* 383.

The possession of *Pressell* is claimed as adverse. That position is untenable. 6 Blackf. 527.—2 Ind. R. 17.

Per Curiam.—The decree is affirmed with costs.

J. L. Ketcham, for the appellants.

H. O'Neal, for the appellees.

The State *v.* Watson.

Section 3 of chapter 71 of the R. S. 1843, does not make it penal to issue or put in circulation as a circulating medium, or substitute for bank notes, bills containing a promise to pay a sum of money in bank notes.

Nov. Term, 1853.

THE STATE v. WATSON.

Saturday, December 31.

ERROR to the *Vigo* Circuit Court.

ROACHE, J.—Indictment against *Watson* for issuing and putting in circulation his individual bills, designed to be used as a substitute for bank notes and as a circulating medium.

The same facts are variously stated in five several counts. The bills are alleged to have been of the denominations of one, two and three dollars, and to have been "in the form of a promise to pay to *J. Marshall* or bearer, on demand, in *Indiana*, *Illinois*, or *Ohio* bank notes," &c.

The Circuit Court quashed the indictment, on the ground that the statute only applies to bills importing a promise to pay money, and that as the bills described promised payment of an article other than money, to-wit, in bank bills, which are not money, they were not such "bills" as were prohibited by the statute, and it was consequently no violation of the statute to issue them.

The act on which this indictment is predicated—sec. 3, c. 71, R. S. 1843, p. 1042—makes it penal "to issue or put in circulation any bills, certificates or receipts designed to be used as a circulating medium, or as a substitute for bank notes as above specified."

In order to determine the sense in which the term "bills" is used in the third section, it is necessary to examine the preceding sections of the act to which reference is made.

The first section satisfactorily explains the meaning of the words. It enacts—

That all bills, &c., issued by any individual, &c., "either in the form of certificates or receipts for the deposit of *money*, or of promises to pay the bearer, or any specific person any *sum* whatever, for the purpose of being used as a circulating medium, or as a substitute for bank notes, shall be deemed as fraudulent and absolutely void."

The third section makes it penal to issue bills which in the first section are declared void.

The bills described in the first section are only those for the payment of money. The language will admit of no other construction. Bank bills are not money. The bills set out in the indictment are not for the payment of

money, but for specified sums payable in the notes of various banks. The holder could not require of *Watson* money upon them.

If the legislature had wished to prohibit the issue and circulation of bills payable in articles of value other than money, we must presume they would have employed language substantially importing such intention. The terms of this act limit the offence clearly to the issue of bills for the payment of money, and the known rules of construction preclude the giving it an interpretation beyond the plain purport of the language.

Per Curiam.—The judgment is affirmed.

C. Cruft, for the state.

W. D. Griswold, for the defendant.

HOLTZCLAW *v.* THE STATE.

An examining magistrate could require two or more persons to enter into a joint recognizance to appear and answer to an indictment for murder, when the law authorized a joint trial of persons charged with being jointly concerned in the commission of that crime.

Saturday, December 31.

ERROR to the *Jefferson* Circuit Court.

PERKINS, J.—*Scire facias* on a forfeited recognizance.

Pleas, 1. *Nul tiel record.* 2. "That before entering into said recognizance, the said *Eli Holtzclaw*, *Thomas Holtzclaw*, *Henry Holtzclaw*, senior, and *Henry Holtzclaw* junior, were arrested upon a warrant issued by *Milton Stapp*, mayor and justice as aforesaid, to-wit, on the 10th day of *June*, 1851, upon a charge of murder, and were then and there tried upon said charge before said mayor, who then and there found the said *Henry Holtzclaw*, junior, *Thomas Holtzclaw* and *Eli Holtzclaw* guilty of said charge,

Nov. Term, 1853.

HOLTZCLAW v. THE STATE.

and held them to bail in the joint sum of 5,000 dollars to appear at said next term of said *Jefferson* Circuit Court to answer to said charge; and said *Stapp*, mayor, then and there required said *Henry*, *Thomas* and *Eli* to enter into a joint bond for their, and each of their, appearance as aforesaid in said penalty, with security; whereupon said *Thomas*, *Eli* and *Henry*, with their said security, to obtain their release from the custody of the said officers of the law, did enter into said recognizance, as they were compelled to do.

The third plea was substantially like the second.

Demurrers were sustained to the second and third pleas. The issue on the first was tried. Judgment for the state.

The ground of objection taken by the plaintiffs in error is, that the recognizance is invalid because a joint one, against their consent. In other words, they contend that the Court could not require them to enter into a joint recognizance.

No authority is cited to sustain the position, and none has fallen under our notice.

The defendants below, the plaintiffs in error, were charged with, and found guilty of, the joint commission of murder. If jointly indicted, the Court might, as the law then stood, require them to be tried jointly, and, hence, we see no good reason why they should not be required by the examining magistrate to enter into a joint obligation to appear for such trial.

We have seen no authority on the point.

Per Curiam.—The judgment is affirmed with costs.

J. G. Marshall, for the plaintiff.

J. W. Chapman, for the state.

Nov. Term, 1853.

ROSENBAUM v. THE STATE.

ROSENBAUM v. THE STATE. 4 599 134 84

The act to regulate the retailing of spirituous liquors, &c., approved *March* 4, 1853, does not prescribe any penalty for selling spirituous liquors on *Sunday*.

Crimes and misdemeanors, in this state, must be defined, and the punishment therefor fixed, by statute, and not otherwise.

APPEAL from the *Dearborn* Court of Common Pleas.

Saturday, December 31.

STUART, J.—It is charged that the appellant, being a licensed grocer, &c., sold spirituous liquors on *Sunday*. Motion to quash the information overruled. Plea of guilty, and judgment accordingly.

The same defect exists in this case as in *Divine* v. *The State* at the last term, (1) and the plea operates here as the evidence did in *Hare* v. *The State* (2) to cure that defect.

Perhaps the same doctrine might be beneficially carried still further. It may be doubtful whether by the plea the defendant has not shown affirmatively that he is not within any of the provisoes or exceptions in the statute. The plea admits that he has violated its substantive provisions. For the Courts to presume in his favor in the face of his own admissions, might look too much like subtlety. The whole record must be taken together; and it does not appear that the courts should presume against anything which the record affirmatively discloses. However, we reserve that point for future consideration.

If there were any unfairness in procuring the plea of guilty, that would present another question.

On the other hand, there is nothing in the revision that we are aware of, and surely no consideration of sound policy, which should induce the courts to relax the strictness required in all the substantials of criminal pleading and evidence. Any other rule would be pernicious in its tendency. The harmless decision of to-day becomes the dangerous precedent of to-morrow. The people have no better security than in holding the officers of the state to a reasonable degree of care, precision, and certainty in prosecuting the citizen for a violation of the law.

Thus regarded, there is a fatal defect for which the in-

Nov. Term, 1853.

ROSENBAUM v. THE STATE.

formation should have been quashed. By the sixth section it is provided that a license granted under the provisions of the first section shall not authorize the sale of spirituous liquors on *Sunday*. By the fifth section the penalty only applies to a violation of the preceding sections. On the well-known principle of strict construction applicable to penal statutes, we cannot extend this penalty to the subsequent sections, though this rule seems to be modified by the R. S. of 1852. The subsequent penalties are all applied to specific cases, and do not extend to the sixth section. We cannot seek a penalty in other statutes on the same subject, for they are all repealed by the nineteenth section. Nor can we fall back on the common law; for crimes and misdemeanors must be defined, and the punishment therefor fixed, by statute, and "not otherwise." R. S. 1852, vol. 1, c. 61, s. 2. The matter then, in brief, stands thus: The sixth section points out an offence, but there is no statutory penalty attached to it, and under our laws there can be no other penalty. As nothing can be taken by intendment, it is a *casus omissus* of which neither the responsibility nor the remedy rests with the judiciary.

It is suggested by counsel that retailing on *Sunday* may perhaps be a breach of the bond; and it might be further suggested that perhaps the offender might be liable under the ninth section for a nuisance. But as these questions are not judicially before us, we cannot speak "with authority."

In the form the charge is made, it is clearly unauthorized, and should have been quashed.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Ryman, for the appellant.

E. Dumont, for the state.

(1) *Ante*, p. 240.—(2) *Ante*, p. 241.

(3) The judgments in three other cases of *Rosenbaum* v. *The State* were reversed, on this day, for the reasons given in this case.

Nov. Term, 1853.

BRUTTON v. THE STATE.

4	601
124	383
4	601
149	235
4	601
f169	160

BRUTTON *v.* THE STATE.

The law in relation to exceptions in a statute is, that if the exception be contained in a subsequent clause or statute, it is matter of defence, and need not be negatived in the information; but if it be closely connected with the enacting clause, or if it be in the same clause of the act which creates an offence, it is necessary to show by negative averment that the defendant is not within the exception.

An information under the first section of the liquor act of 1853, for retailing spirituous liquor without license, did not aver that the liquor was not sold for sacramental, mechanical, chemical, medicinal, or culinary purposes. *Held*, that the information was bad on motion to quash.

An information for retailing spirituous liquor should state the price for which the liquor was sold.

An information for retailing under the liquor act of 1853, stated that the defendant sold less than a gallon, without otherwise specifying the quantity. *Held*, that the information was bad, on motion to quash.

Saturday, December 31

APPEAL from the *Dearborn* Court of Common Pleas.

STUART, J.—It is charged that *Brutton* sold liquor without license. Motion to quash overruled. Trial and judgment for the state.

It is objected to the information that it does not negative the exception in the first section of the act of 1853 as to the sale of liquor for sacramental, mechanical, chemical, medicinal and culinary purposes. The law in relation to exceptions in a statute is well settled. If the exception be contained in a subsequent clause or statute, it is matter of defence and need not be negatived in the information. Thus the statute of 1 *Elizabeth*, c. 2, punishing absence from church, the party "having no reasonable excuse," &c., it is not necessary to aver in the indictment that he had no reasonable excuse for his absence: the matter of excuse comes from the defendant. 1 Chitty Crim. L. 283.—Arch. 48–9. But according to the same authorities, if the exception be closely connected with the enacting clause, or if it be in the same clause of the act which creates the offence, it is necessary to show by negative averment that the defendant is not within the exception. The position of the exception in the statute

Nov. Term, 1853.

BRUTTON v. THE STATE.

under consideration is clearly within the rule requiring the negative averment.

This exactness in criminal pleadings is not an idle technicality. But on the contrary, it is a safe and salutary public policy deduced from experience and supported by the weightiest reasons. *Rosenbaum* v. *The State*, *ante*, p. 599.

This information is also defective in that it does not allege any price or any quantity of liquor sold. To aver a sale of less than a gallon, without specifying the sum and the quantity, is inverting the pleadings and alleging conclusions instead of facts. *Divine* v. *The State*, *ante*, p. 240.

Per Curiam.—The judgment is reversed. Cause remanded, &c. (1)

J. Ryman, for the appellant.

E. Dumont, for the state.

(1) The judgments in seven other cases of *Brutton* v. *The State* were affirmed, on this day, for the reasons given in this case.

---

4 602
145 492

BRUTTON *v.* THE STATE.

The defendant was convicted for retailing, under the first section of the liquor act of 1853, neither the affidavit nor the information alleging that the liquor was sold for mechanical, medicinal, or culinary, &c., purposes. That section provides that no person shall retail spirituous liquors, except for sacramental, mechanical, chemical, medicinal, or culinary purposes, without filing with the auditor his bond, &c. *Held*, that the conviction was wrong.

Saturday, December 31.

APPEAL from the *Dearborn* Court of Common Pleas.

PERKINS, J.—Prosecution for retailing without license, under the liquor act of 1853. Conviction below.

Neither the affidavit nor the information negatives that the liquor was sold for mechanical, medicinal, or culinary, &c., purposes. The section of said liquor act which prohibits retailing, provides "that no person shall retail spirituous liquors, except for sacramental, mechanical, chemical, medicinal or culinary purposes," "without filing with the auditor his bond," &c.

The exception, which is very comprehensive, is contained, it will be observed, in the body of the prohibitory section; and there is no rule better settled than that in such cases the indictment, information, or complaint must negative it.

This rule is too familiar to the profession to require a citation of authorities to prove its existence. See Chit. Crim. Law, vol. 1, p. 284. And Mr. *Chitty* remarks, same page, that in prosecutions upon penal statutes much greater strictness is required than in the case of an indictment; "for, in general," he says, "it is necessary to show by negative averments, that the defendant is not within any of the provisoes or exceptions of the statute" itself in such prosecutions.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Ryman, for the appellant.

E. Dumont, for the state.

Lemon *v.* The State.

An information under the liquor act of 1853 which does not allege that the liquor was not sold for sacramental, mechanical, chemical, medicinal or culinary purposes, is bad, on motion to quash.

Information under the liquor act of 1853, for retailing spirituous liquor. The retailing was charged and proved to have taken place on the 4th of *June*, 1853. The defendant produced a license regularly issued by the

Nov. Term, 1853.

THE STATE v. WARNER.

auditor, dated *November* 7, 1852, authorizing him to retail spirituous liquor for one year, and proved that at the *April* election, 1852, a majority of the votes in the township for which the license issued, and where the retailing took place, were cast in favor of granting license. *Held*, that the license covered the period when the retailing took place, and was valid.

Saturday, December 31.

APPEAL from the *Dearborn* Court of Common Pleas.

ROACHE, J.—This was an information against *Lemon* for retailing. The defendant was found guilty and fined.

A motion to quash the information was overruled. This was erroneous. The information was defective for the reason that it did not allege that the liquor was not sold for mechanical, sacramental, chemical, medicinal or culinary purposes. *Brutton* v. *The State*, *ante*, pp. 601, 602.

On the trial the defendant produced a license regularly issued to him by the county auditor, under date of 7th *November*, 1852, authorizing him to vend and retail spirituous liquors for one year. He also proved that at the *April* election, 1852, a majority of votes in the township for which the license issued, and in which the retailing took place, were cast in favor of granting license.

The retailing was charged and proved to have taken place on the 4th of *June*, 1853.

The license covered the period when the act of retailing took place, and was valid. *Rust* v. *The State*, *ante*, p. 528.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the appellant.

E. Dumont, for the state.

THE STATE *v.* WARNER.

In an indictment for an affray, it is sufficient to allege the county where the offence was committed, without specifying the township.

ERROR to the *Morgan* Circuit Court.

Nov. Term, 1853.

SUMPTER v. THE STATE.

ROACHE, J.—*Warner* was convicted with one *Gilpin* for an affray. The prosecutor entered a *nolle prosequi* as to *Gilpin*. The indictment charged that *Warner* and *Gilpin*, "in *Washington* township, in said county of *Morgan*, with force and arms, being then and there unlawfully assembled and gathered together in a warlike manner, then and there at a public place in said township in said county, did then and there unlawfully, by agreement, fight and make an affray with each other," &c.

Saturday, December 31.

On motion of *Warner*, the indictment was quashed, on the ground that the particular place, as the town or farm where the affray took place, was not specified.

This was unnecessary. It was sufficient to allege the offence to have been committed in the county of *Morgan*, without specifying the township. *Morris* v. *The State*, 1 Blackf. 37.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. A. Riley, N. B. Taylor and *J. Coburn*, for the state.

SUMPTER *v.* THE STATE.

Jennings county is one in which by the act of *January* 16, 1849, exclusive original jurisdiction, in cases of assault and battery, is vested in justices of the peace.

ERROR to the *Jennings* Circuit Court.

Saturday, December 31.

ROACHE, J.—Indictment for an assault and battery, returned at the April term, 1850.

At the October term, 1850, the defendant moved to quash the indictment. The motion was overruled. Trial by jury. Verdict and judgment against the defendant.

Nov. Term, 1853.

THE STATE v. BURGESS.

Jennings is one of the counties in which, by the act of *January* 16, 1849, exclusive original jurisdiction in assault and battery is vested in justices of the peace.

The indictment should have been quashed. *Sprigs* v. *The State*, 2 Ind. R. 75.—*The State* v. *Lackey*, *id.* 285.—*Smith* v. *The State*, *ante*, p. 500.

Per Curiam.—The judgment is reversed.

D. Kelso, for the plaintiff.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the state.

THE STATE *v.* BURGESS.

To authorize the issuing of process under s. 3, p. 385, R. S. 1852, for the apprehension of a person accused of retailing spirituous liquor without license, the testimony should show the name of the person to whom the liquor was sold, or that his name is unknown.

Saturday, December 31.

ERROR to the *Tippecanoe* Court of Common Pleas.

PERKINS, J.—This was a proceeding on the part of the prosecuting attorney, instituted in *April*, 1853, under section 3, p. 385, of vol. 2, R. S. 1852, to establish, *ex parte*, before the *Tippecanoe* Court of Common Pleas, the charge of retailing without license against the defendant, *Burgess*, and cause him to be arrested and put on trial upon said charge. The Court heard the testimony adduced in support of the accusation, and refused to order the arrest upon it.

The testimony was as follows:

E. T. Townley swore "that the above defendant sold spirituous liquors up to the 7th of *March* last, and that he sold ten different times from the 1st of *December* to the said 7th of *March* by a less quantity than a quart, and to different persons."

This was all the testimony offered. It was insufficient.

if for no other reason, because it did not show the names of the persons to whom the selling took place, or show them to be unknown.

Per Curiam.—The judgment is affirmed.

L. Reilly, for the state.

W. F. Lane, for the defendant.

The State *v.* Boyle and Another.

Saturday, December 31.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Per Curiam.—The judgment in this case is affirmed for the reasons given in *The State* v. *Lockstand*, *ante*, p. 554. (1)

L. Reilly, for the state.

W. F. Lane and *W. C. Wilson*, for the appellee.

(1) The judgment in another case of *The State* v. *Boyle et al.* was on this day affirmed, for the reasons given in this case.

Neilson and Others *v.* Lagow.

The Bank of *Vincennes* conveyed a tract of land to certain persons in trust to sell, under the direction and for the benefit of the *United States*, and to convey the same in fee simple to the purchaser and his heirs; but the deed did not, in terms, convey the land to the trustees and their "heirs." *Held*, notwithstanding, that the deed passed the fee to the trustees.

Nov. Term, 1853.

NEILSON v. LAGOW.

Saturday, December 31.

APPEAL from the *Knox* Circuit Court.

PERKINS, J.—Disseizin by *Lagow* against *Neilson* and others to recover possession of a parcel of land situate in *Knox* county, known as the steam-mill tract. The general issue was pleaded. Trial by a jury, and verdict for the plaintiff. The Circuit Court rendered judgment upon the verdict. The cause was appealed to this Court, where that judgment was affirmed *sub silentio*. It was then removed to the Supreme Court of the *United States*, and there the judgment of this Court was reversed, and the cause remanded for further proceedings to be had here. The facts of the case are stated in 7 How. (U. S.) R. p. 772, and the opinion of the Court, with a statement of the case, is reported in 12 *id.* 98. A brief summary only of the facts of the case can now, therefore, be justified.

Lagow claims to have been the owner of the land in 1820, and to have conveyed it to the bank of *Vincennes*. The bank conveyed it to certain persons in trust to sell, under the direction and for the benefit of the *United States*, to whom the bank had become indebted, and to convey the same by deed in fee simple to the purchaser and his heirs; but the deed to said trustees by the bank did not contain the word "heirs." (1) *Neilson* was in possession under said trustees, who were all dead when this suit was commenced. The bank of *Vincennes*, to which *Lagow* conveyed, had forfeited its charter and been dissolved.

Upon these facts *Lagow* contends that the deed of said bank to the trustees, it not containing the word heirs, conveyed but a life estate; that, hence, on the death of all of said trustees, the land reverted to the bank, and, it being dissolved, reverted to him, the grantor of the bank.

He assumes another ground also. He insists that said deed from the bank to the trustees was void by virtue of the seventh section of the act of congress of *May* 1, 1820. (3 stat. at large 568) which enacts, "that no land shall be purchased on account of the *United States*, except under a law authorizing such purchase;" and that, hence, the

title remained in the bank, notwithstanding said deed, and reverted to him on its dissolution.

These two questions are, therefore, presented:

1. Was the deed from the bank to trustees for the *United States* void under the act of congress of *May* 1, 1820?

2. If not, did it convey more than a life estate to said trustees?

A decision by this Court against the deed on the ground that it was void under said act of congress, would be one that the Supreme Court of the *United States* would have jurisdiction to review; while, on the other hand, a decision that said deed conveyed but a life estate would not present a question of which that Court could take jurisdiction; yet either of these decisions would have the effect to give the land in question to *Lagow*.

On this ground *Lagow's* counsel argued in the Supreme Court of the *United States* that that Court ought to affirm the judgment heretofore rendered in the cause by this Court, inasmuch as it did not appear, no written opinion having been given, upon which of said questions the Court did decide it. But that Court held that they would look into the record and see what questions it presented to this Court for decision; and declared that, in doing so, they could come to no other conclusion than that this Court must have held the deed in question void under the act of congress, because the law was plain enough that, if the deed was valid, it conveyed a fee-simple estate; and the Court then proceeded to decide that said deed was not void under said act of congress, as that act should not be construed to prohibit the acquisition of the equitable or legal title to land when taken as security for a debt. This latter point is, consequently, finally settled.

It only remains, therefore, for this Court to make a decision as to the estate conveyed by the deed of the bank to the trustees for the benefit of the *United States*. It has long been settled that a fee simple may be passed in lands by devise without the use of the word heirs, the intention of the devisor, as drawn from the whole will, in

Nov. Term, 1853.

NEILSON v. LAGOW.

such case, governing; and, further, that upon a devise to trustees they will take an estate commensurate with the interest required to execute the trust, which, indeed, is but the application to such a case of the general principle that, in wills, the intention governs. The law, however, as the general rule, has been otherwise in regard to conveyances by deed. They have been taken to convey no greater estate than was expressed. It is not a principle, we admit, that is favorably regarded in this country; and it has been set aside in some of the states by legislation. It originated in the feudal policy which sought to prevent, as far as possible, the transfer of lands from the families possessing them, and to give the lord the power of designating the tenant who might be their occupant. But still it has been an established principle, and we do not find that the application of it has been withheld from conveyances in trust. Mr. *Hill*, in his late work on trustees, page 251, says, "There does not appear to be any decided case in which an estate, given by *deed* to trustees *without any words of limitation*, has been constructively *enlarged* into a fee (as in the case of a devise by will) in consequence of the nature and purposes of the trust; as from a direction for them to sell or convey; although there is a *dictum* of Lord *Hardwicke* directly in favor of this construction." That *dictum* is in *Villiers* v. *Villiers*, 2 Atk. 72. Mr. *Hill* speaks, of course, in reference to the *English* authorities.

There are *American* decisions that thus, by construction, enlarge an estate granted by a deed in trust, into a fee. The courts of *New-York* and *Massachusetts* have established the doctrine in those states, and the Supreme Court of the *United States* has, in the case under consideration, followed and sanctioned it. The doctrine is applied at law as well as in chancery. It was so applied in this case by the Supreme Court of the *United States*, and see *Welch* v. *Allen*, 21 Wend. 147.—*Gould* v. *Lamb*, 11 Met. 84.—*Fisher* v. *Fields*, 10 Johns. 495. In this latter case, chancellor *Kent*, after observing that it had frequently been thus ruled in chancery, but without distinguishing whether

upon deeds or devises, says, the Court of King's Bench, in *England*, in the time of Lord *Mansfield*, "made the same decision at law." That decision was made in the ejectment case of *Oates* v. *Cooke*, 3 Burr. 1684, and arose upon a devise, and not upon a deed.

The rule as declared in these *American* decisions is undoubtedly the better one, and we adopt it, and hold that a fee passed to the trustees in the case before us.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. Cushing, *R. W. Thompson*, *D. Mace* and *H. O'Neal*, for the appellants.

S. Judah, for the appellee.

(1) The record shows that neither the habendum nor the grant in the deed contained the word heirs.

LEWADAG *v.* THE STATE.

ERROR to the *Jefferson* Circuit Court.

STUART, J.—This case falls within the rule in *Hare* v. *The State*, *ante*, p. 241.

The position that the license from the city of *Madison* authorized him to sell is untenable. *Sloan v. The State*, 8 Blackf. 361.

J. R. Troxell, for the plaintiff.

D. S. Gooding, for the state.

Nov. Term, 1853.

PEELMAN v. PEELMAN.

4 61
136 50

PEELMAN v. PEELMAN and Others.

A. having executed to *B.* a bond for the conveyance of land, upon which *C.* was a surety, *C.* afterward executed a bond to *A.* for the conveyance of certain other lands so soon as *A.* should have made the deed to *B.* in pursuance of his bond. *Held*, that *C.'s* agreement to convey to *A.* was gratuitous and void.

The plaintiff cannot recover in chancery on a ground not taken in his bill.

Saturday, December 31.

ERROR to the *Switzerland* Probate Court.

DAVISON, J.—Bill by the plaintiff against the defendants to compel a specific performance of a contract to convey land. The defendants are the heirs at law of *Christopher Peelman*, deceased.

The contract sued on is a title bond, executed by *Christopher Peelman* in his life-time to *John Peelman*, the plaintiff, whereby he, *Christopher*, bound himself in the penalty of 300 dollars to make a deed to the said *John Peelman* for forty acres of land (describing it) so soon as he, *John*, shall have made a deed to a certain other tract of land agreeably to a bond given to one *John Turner*, and lifted said bond. This bond was signed by *Christopher Peelman* as security for the plaintiff.

The bill alleges that the plaintiff made a deed to *Turner's* assignee and lifted the bond given to him, and thereupon prays a specific performance against said heirs. The defence set up by the answer denies the right of the plaintiff to a decree, upon the ground that there was no consideration for the agreement to convey; that *Christopher Peelman's* bond was an undertaking on his part to give *John Peelman* forty acres of land if he, *John*, would comply with his own contract previously made—an obligation which, in point of law, he was bound to perform.

The evidence shows that the plaintiff had made *Turner's* assignee a deed and lifted his bond; that *Christopher Peelman*, prior to the execution of his contract to convey the forty acres of land, had sold it to the plaintiff and received full payment therefor; that the plaintiff, under

his purchase, had, in *Christopher's* life-time, occupied and used the land as his own, and still remains in possession of it.

Upon a final hearing of the cause, the Court dismissed the bill.

In our opinion, this decision was correct. *John Peelman*, prior to the execution of the contract sued on, had obligated himself to make a deed to *Turner*. The performance of this obligation is set forth in the bill as the only consideration for *Christopher Peelman's* bond. This consideration was not sufficient to support the contract. The making of the deed to *Turner's* assignee could not, in contemplation of law, result in benefit to *Christopher*, or injury to the plaintiff. In effect it was saying to *John Peelman*, do what the law binds you to perform, and I, *Christopher*, will give you forty acres of land. The promise to convey to *John* was obviously gratuitous.

But the evidence shows that the plaintiff paid for the land, and occupied it under a purchase from the obligor of the title-bond. Hence it is contended that the plaintiff is entitled to a deed. This argument does not meet the case before us. The instrument sued on shows the consideration of the undertaking. The bill does not profess to set up any other. The plaintiff cannot recover on ground not taken in his bill. It was, therefore, not competent for him to show a consideration varying from the one alleged.

Per Curiam.—The decree is affirmed with costs.

D. Kelso, for the plaintiff.

J. Sullivan, for the defendants.

Nov. Term, 1853.

Mitchel v. Whitcomb.

Foster v. Mabes.

ERROR to the *Dearborn* Circuit Court.

Saturday, December 31.

Stuart, J.—Action commenced and tried before a justice, and appealed. In the Circuit Court the plaintiff amended his cause of action. Demurrer sustained and judgment for the defendant for costs. We think the amended cause of action substantially good, no great exactness being required in suits before a justice. It is distinguished from *Stackberger* v. *Mosteller*, *ante*, p. 461, in that the plaintiff entered into possession. The demurrer should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Ryman, for the plaintiff.

J. T. Brown, for the defendant.

Mitchel v. Whitcomb.

Saturday, December 31.

ERROR to the *Vermillion* Circuit Court.

Per Curiam.—This case was submitted in *May*, 1850. Under the ruling in *Hand et al.* v. *Taylor*, *ante*, p. 409, it is affirmed with costs.

J. A. Wright and *E. W. McGaughey*, for the plaintiff.

C. W. Barbour, for the defendant.

GRAHAM *v.* DOE on the demise of MCDONALD.

After judgment in ejectment in the Circuit Court for the lessor of the plaintiff, the defendant filed a petition under the occupying claimant law, which was resisted; and the president judge being absent, the associate judges, who were divided in opinion, placed the result of their deliberations upon the record as follows: Being divided in opinion we cannot agree upon the propriety of allowing or overruling said motion. Then followed the petition. No judgment was rendered, nor motion interposed at the proper time for a new trial, nor bill of exceptions taken, nor was the evidence inserted in the record.

Held, that there was no action of the Court from which either party could appeal or prosecute a writ of error.

Held, also, that in legal contemplation, the petition was still pending in said Court; and, *semble*, that on motion a judgment might yet be entered *nunc pro tunc*, or the petitioner might have the petition docketed and proceed *de novo*.

Semble, also, that after judgment in ejectment, a proceeding commenced under the occupying claimant law of 1843 is invested with the attributes of an independent action, and may, the judgment in ejectment being suffered to rest, be the subject of an appeal to the Supreme Court.

Semble, also, that an appeal by the defendant from the judgment in ejectment could not be taken as a waiver of his claim as an occupying claimant.

ERROR to the *Daviess* Circuit Court.

Saturday, December 31.

STUART, J.—Action of ejectment. Verdict and judgment for the lessor of the plaintiff below. *Graham* appealed. After the prayer had been granted and the terms fixed, but before the appeal was perfected, *Graham* filed a petition under the occupying claimant law, which was resisted, and the Court, the associate judges being equally divided, placed the result of their deliberations on the record as follows: Being divided in opinion, we cannot agree upon the propriety of allowing or overruling said motion. Then follows the petition.

There was no motion interposed at the proper time for a new trial, no bill of exceptions, and no evidence in the record. The ejectment part proper has been long since disposed of, and is not before us. The action of the associate judges on the motion to impannel a jury for the assessment of damages, is the only matter argued by counsel.

Nov. Term, 1853.

GRAHAM v. DOE.

On this state of facts there does not seem to be anything before us for adjudication. The division of opinion between the judges operated as a denial of the prayer of the petition. But it was not followed by the proper judgment, nor indeed by any judgment. So that there was no action of the Court from which either party could appeal or prosecute error. In the absence of any further act of the parties, the petition is still in contemplation of law pending in that Court. It is presumed that on motion, &c., a judgment might yet be entered *nunc pro tunc;* or *Graham* might have the petition docketed and proceed *de novo.*

The proceeding under the occupying claimant law (R. S. 1843) does not seem to be altogether an incident or mere sequence of the action of ejectment. It is in some measure a statutory appendage to that action; but yet entirely different in all its features. The statute gives to the parties the right of appeal or writ of error as in other cases. So that while the judgment in ejectment may be permitted to slumber as satisfactory to both parties, the proceeding under the occupying claimant law may be pending in the superior Court. When once the main fact from which it flows has transpired, that is, a judgment in ejectment (sect. 48), the subsequent proceeding by petition seems to be clothed with the attributes of an independent action.

In this instance the petition seems to have been properly filed. Whether it superseded the appeal in the ejectment case, might be a different question. But we do not see how the appeal, whether perfected or not, could be taken as a waiver of *Graham's* claim as an occupying claimant. His right to assert that claim was clearly not in the discretion of the Court.

But as there is nothing before us, we would not be understood as deciding any of these questions definitely.

Per Curiam.—The writ of error is dismissed with costs.

E. S. Terry, for the plaintiff.

S. Judah and *D. McDonald*, for the defendant.

CLARK and Wife *v.* McDONALD and Others.

ERROR to the *Clark* Circuit Court.

Per Curiam.—The decree is affirmed. See the case of *Hand* v. *Taylor*, *ante*, p. 409. *Saturday, December 31.*

C. Dewey, for the plaintiffs.

J. G. Marshall and *R. Crawford*, for the defendants.

EASTES *v.* DAUBENSPECK.

A bill of exceptions, which does not appear to have been signed by a judge, cannot be noticed.

ERROR to the *Hamilton* Circuit Court. *Saturday, December 31.*

Per Curiam.—The bill of exceptions in this case, or what purports to be such, does not appear to be signed by any judge. The errors complained of arise upon no other part of the record.

We cannot take any notice of the contents of the alleged bill of exceptions in the absence of the authentication of a judge's signature.

The judgment is affirmed, with 10 per cent. damages and costs.

T. D. and *R. L. Walpole*, for the plaintiff.

S. Yandes, for the defendant.

BACON and Others *v.* DENNY, Administrator, and Others.

ERROR to the *Vigo* Probate Court. *Saturday, December 31.*

Per Curiam.—The judgment is affirmed with costs.

W. D. Griswold, for the plaintiffs.

J. P. Usher, for the defendants.

Nov. Term, 1853.

KELLEY v. MASON.

KELLEY
v.
MASON.

The R. S. 1843 authorized the service of a summons by leaving a copy at the defendant's usual place of residence.

The statute did not contemplate that the seal should be copied.

The date is not a material part of a summons.

A defendant served with a summons by leaving a copy at his residence, cannot obtain a continuance simply because he was absent when the copy was left, and received no notice of the suit till the day before the commencement of the Court.

Saturday, December 31.

ERROR to the *Ripley* Circuit Court.

DAVISON, J.—This was an action of debt by *Mason* against *Kelley*, upon a promissory note. The record shows that the defendant below, without appearing in the cause, moved the Court for a continuance. In support of the motion he filed his affidavit, stating, *inter alia*, that the summons in the case was issued on the 24th of *March*, 1852, upon which the sheriff made return that he had "served it by leaving a copy thereof at the defendant's usual place of residence." The term of the Court to which said writ was returnable, commenced on the 19th of *April*, 1852. The defendant, at the time said copy was left, was at *Cincinnati, Ohio*, and did not return to his residence until the 17th of said month; nor had he any notice whatever of said copy until the day after his return. The affidavit points out a variance between the writ issued by the clerk and the copy left by the sheriff. The writ is dated *March* 24, 1852, while the copy purports to bear date *April* 9, 1852. The writ has the seal of the Court, but the copy presents no appearance of a seal. The record further shows that the plaintiff admitted the facts set forth in the affidavit, and that the Court overruled the motion for a continuance of the cause, and gave judgment for the plaintiff.

This motion was properly overruled. The service of the summons by leaving a copy at the defendant's usual place of residence, was in accordance with the statute. R. S. 1843, c. 40, s. 23. There is nothing in the variance

between the writ and the copy. The date is not a material part of the writ, nor does the statute intend that the seal should be copied. The fact that the defendant was absent and not actually notified of the suit until one day prior to the commencement of the Court, was not, alone, sufficient cause for a continuance. Had he set up a valid defence to the action, and shown that he was unprepared for trial, his motion might have been sustained. *Pendleton* v. *Vanausdal*, 2 Ind. R. 54.—*Conwell* v. *Atwood*, *id.* 289.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

J. Robinson, for the plaintiff.

A. W. Hubbard, for the defendant.

Reynolds for the use of Haines and Others *v.* Stevenson.

4 619
136 161
4 619
144 187

The making of a promissory note on *Sunday* is common labor within the meaning of s. 123, c. 53, R. S. 1843.

ERROR to the *Wayne* Circuit Court.

Saturday, December 31.

Davison, J.—Debt by the plaintiff in error against the defendant on a promissory note. The note is dated the 1st of *April*, 1850. The defendant pleaded two pleas. 1. *Nil Debet*. 2. that the said note was not made and executed on the day the same bears date; but it was made, executed and delivered on the 31st of *March*, 1850, which last-mentioned day was the first day of the week, commonly called *Sunday;* wherefore the said note was void. Demurrer to the second plea overruled.

A statute in force when this note was given provides that "if any person," &c., "shall be found on the first day of the week, commonly called *Sunday*, rioting," &c., "or at common labor, works of charity and necessity only ex-

Nov. Term, 1853.

OSBORN v. THE STATE.

cepted, such person shall be fined," &c. There is a proviso to the statute, but it has no bearing in this case. R. S. 1843, c. 53, s. 123.

It is admitted that the note in question was made on *Sunday*. Then the record presents this question: Did the making of it constitute an act of "common labor?" We think the statute intended to prohibit every description of secular business not within the exceptions pointed out by itself. The executing of this note was secular business, and not embraced by the exceptions. This view is sustained by various adjudications made upon statutes, the provisions of which are, in effect, the same as ours. *Allen* v. *Deming*, 14 N. H. 133.—*Towle* v. *Larrabee*, 26 Maine 464.—*Adams* v. *Hamel*, 2 Doug. (Mich.) 73. In *Link* v. *Clemmens*, 7 Blackf. 479, it was held "that a replevin bond executed on *Sunday* was void." This authority is decisive of the case before us. The note, no doubt, was made in violation of the statute. Therefore it must be considered a nullity.

Per Curiam.—The judgment is affirmed with costs.

T. Means, for the plaintiff.

OSBORN and Others *v.* THE STATE on the relation of the AUDITOR OF DELAWARE COUNTY.

Saturday, December 31.

ERROR to the *Delaware* Circuit Court.

Per Curiam.—In this case there is no brief from either party.

Judgment on a demurrer to the declaration, and assessment of damages by a jury.

The evidence is not upon the record.

A motion was made to quash the writ, which was overruled.

Nov. Term, 1853.

THE STATE v. KIGER.

It appears, on looking through the record, that no point, unless of a frivolous character, is presented, and the judgment is affirmed, with 10 per cent. damages and costs.

W. March and *J. S. Buckles*, for the plaintiffs.

D. Kilgore and *T. J. Sample*, for the state.

THE STATE *v.* KIGER.

An indictment was as follows: State of *Indiana*, *Delaware* county, ss. In the *Delaware* Circuit Court, *September* Term, 1851. The Grand Jurors for the State of *Indiana* upon their oath present, &c. *Held*, that it sufficiently appeared that the grand jury sworn and impanneled at that term in *Delaware* county was meant.

The R. S. 1852 did not take effect till the 6th of *May*, 1853.

Section 3, p. 431, vol. 1, R. S. 1852, contains a saving clause as to all misdemeanors committed under the prior law.

Saturday, December 31.

APPEAL from the *Delaware* Circuit Court.

STUART, J.—Indictment for gaming. On motion of *Kiger*, the indictment was quashed in the Court below. There is no brief for the defendant, and the state furnishes no authority. We are thus left to imagine what considerations induced the action of the Court below.

We are unable to discover any defect in the indictment. The introductory part is not according to the forms. (1) Yet it sufficiently appears that by the grand jurors of the state of *Indiana*, is meant the grand jury sworn and impanneled at that term in *Delaware* county.

The Common Pleas act could not affect this case, for the offence was committed before that went into operation. And the revised statutes of 1852 could not be in the mind of the Court, for they did not take effect till the 6th of *May*, 1853. *Jones* v. *Cavins*, *ante*, p. 305. Even had they been in force, there is a saving clause as to all

Nov. Term, 1853.

THE STATE v. FIMPLE.

misdemeanors committed under the old law. R. S. 1852, vol. 1., p. 431, s. 3.

We think the Court erred in quashing the indictment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c. (2)

R. A. Riley, for the state.

J. S. Buckles, for the appellee.

(1) The indictment was as follows: State of *Indiana*, *Delaware* county, ss. In the *Delaware* Circuit Court, *September* Term, 1851. The Grand Jurors for the State of *Indiana*, upon their oath present, &c.

(2) The judgments in two other cases of *The State* v. *Kiger* were affirmed, on this day, for the reasons given in this case.

THE STATE *v.* BRYANT.

Saturday, December 31.

ERROR to the *Spencer* Circuit Court.

Per Curiam.—This case, submitted in *June*, 1851, has not been briefed on either side.

The judgment is affirmed with costs.

A. L. Robinson, for the state.

J. Pitcher, for the defendant.

THE STATE *v.* FIMPLE.

Saturday, December 31.

ERROR to the *Delaware* Circuit Court.

Per Curiam.—Indictment for violating the estray laws. Motion to quash in the Court below sustained.

There is no brief on either side. On examination we consider the indictment substantially good.

The judgment is reversed with costs. Cause remanded, &c.

J. S. Buckles, for the state.

D. Kilgore, for the defendant.

THE STATE *v.* THOMPSON.

Saturday, December 31.

APPEAL from the *Tippecanoe* Court of Common Pleas.

Per Curiam.—Held, that it is in the discretion of the Court below to allow the prosecutor time to amend, (1) or to order the amendment instanter.

The judgment is affirmed.

L. Reilly, for the state.

W. F. Lane, for the appellee.

(1) The application was for time to amend an information for retailing spirituous liquor.

SWIFT and Another *v.* HETFIELD.

Proceeding under s. 207, c. 30, R. S. 1843, to establish a claim against an estate. A bill of particulars of the claim was filed in the Probate Court and the administrator appeared to answer to the claim. A submission in writing was filed, pursuant to the statute, signed by the attorneys of the parties respectively, which, after stating the names of the parties and the venue, *Franklin* county, stated that it was agreed between the

Nov. Term, 1853.

SWIFT v. HETFIELD.

plaintiff and the administrator to make an amicable suit of the case, waiving the issuing and service of process and a formal declaration; and to submit the matters in dispute to the Probate Court of said county on the account filed. On this submission there was a trial and the plaintiffs recovered a judgment. *Held*, that the judgment should not be reversed on the ground that there was a trial without an issue.

Saturday, December 31.

ERROR to the *Franklin* Circuit Court.

PERKINS, J.—This case originated in the *Franklin* Probate Court, wherein, at the *March* term, 1850, *Samuel* and *John Swift* filed a bill of particulars of an account amounting to 3,424 dollars and 18 cents, which they claimed as due from the estate of *Barnett McCombs*, deceased, on which estate *William Hetfield* was administrator. *Hetfield* appeared to answer to the claim.

The proceedings in the case were had under section 207, p. 524, of the R. S. of 1843, which reads as follows:

"The executor or administrator, and any claimant of any debt or demand against the estate of the deceased, may agree in writing to submit the same, or any matter in controversy touching the same, to the summary decision of the Probate Court; and such Court may hear and determine the same, and adjudge costs, as in actions against administrators; and the judgment of the Court shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process."

Pursuant to this provision a submission in writing was filed in the cause, which we copy:

"State of *Indiana*, *Franklin* county, ss. *John* and *Samuel Swift* v. *William Hetfield*, administrator of *Barnett McCombs*, deceased. Amicable suit on account filed.

"It is agreed by and between said plaintiffs and said *Hetfield*, who, it is admitted, is the administrator of the estate of *Barnett McCombs*, deceased, to make an amicable suit of the above case, waiving the issue and service of process and a formal declaration, and to submit the matters in dispute in said case to the Probate Court of said county on the account filed. *George Holland*, At-

torney for plaintiffs. *Matson* and *Farquhar*, Attorneys for defendant."

On this submission, the Court heard the evidence and arguments of counsel, and found for the plaintiffs the sum of 1,510 dollars and 12 cents.

The defendant, *Hetfield*, prosecuted a writ of error to the *Franklin* Circuit Court, and that Court reversed the judgment of the Probate Court, on the ground that there had been a trial in said Court without an issue, no plea having been put in by the defendant. Upon that decision of the Circuit Court a writ of error was prosecuted to the Supreme Court.

In many of the courts in the *United States* it is decided that where a party goes to trial without the pleadings necessary to form an issue being filed, and the cause is fully heard on such trial, the issue shall be considered as waived, and the judgment not reversible for the want thereof; and this may probably be the better practice.

But this Court has too frequently held, to permit it now to change the line of decision on the point (as it forms a mere rule of practice,) that in ordinary suits at law a trial without an issue is erroneous.

The case before us, however, differs from those in which the rulings of this Court above mentioned occurred, in two particulars:

1. It was submitted to the Probate Court for trial upon an agreed case which disclosed, not, it is true, with the highest degree of certainty, but with reasonable precision, the question which the Court was to try, viz., the correctness of the amount claimed from the estate of *McCombs*, deceased. The case of *Crist* v. *Crist*, 8 Blackf. 574, might seem, from the abridged report of it, to have been one not different, but precisely like the present. It was submitted in the Court below upon an agreed case, no plea having been filed to the declaration, and the judgment in it was reversed in the superior Court because it was tried without an issue. But in that case, the agreed statement upon which the submission was made did not disclose the points in dispute and the questions the Court

Nov. Term, 1853.

SWIFT v. HATFIELD.

was to try. Had it, the decision in the case in the Supreme Court would have been different.

In the case before us, as we have said, such disclosure is made; and the only object, in any case, in extending special pleading to an issue, being to evolve the exact questions for trial, it may be considered that an issue, according to the principles of pleading, was substantially formed for trial in the case.

2. This proceeding was under an express statutory enactment which does not seem to contemplate that there should be formal pleadings. The enactment assumes that a person is claiming payment of a demand against an estate which the executor or administrator denies to be just and refuses to pay; and it authorizes the submission of said claim to the Court for proof, because the executor or administrator does so deny and refuse. But for the refusal of the executor or administrator to pay, there would be no need of resorting to the Court for the purpose of making proof. This very refusal, therefore, operates like the general issue in a suit, and throws the burden of proving the claim upon the asserter of it, as effectually as though such issue were formally joined; and further, the statutory provision seems to require, where a case is submitted to the Court under it, that the issue or question to be tried should be stated by the parties in the agreed case in writing, instead of being raised by pleadings. It says, they "may agree in writing to submit the same [the claim or demand] or any matter in controversy touching the same, to the summary decision of the Court," &c.

This clearly means that the agreement in writing shall contain a statement of the precise matter or point the Court is to determine, and hence a series of pleadings to evolve that matter or point would be superfluous.

The point for trial having been stated in the agreed case in the present instance, the statute was complied with.

We think the Court erred in reversing the judgment of the Probate Court for the cause assigned; and the judg-

ment of the Circuit Court making the reversal must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Nov. Term, 1853.

BROWN v. BROWN.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. Holland, for the plaintiffs.

J. Ryman, for the defendant.

BROWN *v.* BROWN.

An attorney at law having filed a petition for a divorce which was unnecessarily gross and indelicate, and having deported himself improperly in reading it, the Court taxed him with the costs of the cause. *Held*, that the Court acted within its authority.

A Court has the power to protect itself against gross violations of decency and decorum, and an appellate Court can only interfere where the power is shown to have been abused.

ERROR to the *Vanderburgh* Circuit Court.

Saturday, December 31.

ROACHE, J.—Petition for a divorce. On the hearing of the petition, it was dismissed.

The Court taxed the costs of the cause against the attorney of the plaintiff, because of the unnecessary grossness and indelicacy of the petition, and of his improper deportment in reading it.

To set aside this taxation, the cause is brought here.

To protect itself against gross violations of decency and decorum, is a necessary incidental power of a Court. They have the right to punish in this way such misconduct as is alleged in this case, on the part of an attorney. It is a power to be exercised at the sound discretion of the judge, and this Court can interfere only where it is shown to have abused its discretion.

Nov. Term, 1853.

LEACH v. LEACH.

This is not shown in the present case. See *Loveland* v. *Jones*, *ante*, p. 184.

Per Curiam.—The judgment is affirmed with costs.

H. F. Kiger, for the plaintiffs.

C. Baker, for the defendant.

LEACH v. LEACH.

4 628
138 361
4 628
162 15

A. conveyed his farm to *B.*, his son, by deed, for the nominal consideration of 1 dollar. At the same time, *B.* executed a bond to *A.*, in which, after reciting the conveyance, in consideration thereof, he bound himself to cultivate the farm in a husbandlike manner, and to deliver to *A.*, during his life, one-third of the produce, &c. *B.* having failed to deliver the produce as stipulated, *A.* filed his bill to cancel the deed and for an account, &c. *B.* proved upon the hearing the payment of a small amount of money upon the land, but admitted in his answer that the principal consideration was the execution of the bond.

Held, that the deed and bond were but parts of one contract, and were to be treated as a single instrument.

Held, also, that *B.* held the land upon a condition subsequent, that he would, in all things, substantially comply with his covenant.

Held, also, that *B.'s* failure to perform the covenant was a breach of that condition and worked a forfeiture of the estate.

Held, also, that chancery might properly interfere to set aside the conveyance.

Held, also, that upon setting aside the conveyance, an account should be taken, and *B.* should be allowed for the money consideration paid by him, with interest, and for his improvements, and all rents paid; and that he should be charged with the rents of the whole farm, including the part cleared by him, from the time he went into possession.

Saturday, December 31.

ERROR to the *Floyd* Circuit Court.

ROACHE, J.—Bill in chancery by *John S. Leach* against *Jacob B. Leach*.

In 1834, the plaintiff and his wife conveyed to the defendant, his son, the farm on which the former resided, for the nominal consideration of 1 dollar. Contempora-

neously with the execution of the deed, the son executed a bond to the father, in which, after reciting the conveyance, in consideration thereof, among other stipulations, he bound himself to cultivate the farm in a husbandlike manner, and to deliver to the grantor, during his life, the one-third of the produce, that is to say, one-third of the grain, potatoes, &c.

The plaintiff filed the bill, alleging the defendant had violated the condition subsequent on which he held the title, by failing for years to deliver the one-third of the produce of the farm, and praying that the deed might be canceled, and an account taken. The defendant answered, admitting the execution of the bond to have been the principal consideration for the conveyance, but asserts there was a small pecuniary consideration which he paid, and denies that he had failed to deliver the stipulated amount of produce.

A good deal of evidence was introduced on both sides, and on the hearing the Circuit Court dismissed the bill.

The deed and the bond are but parts of one contract, and are to be treated as together constituting a single instrument. *Fellows* v. *Kress*, 5 Blackf. 536.—*Sewall* v. *Henry*, 9 Ala. R. 24.—*Watkins* v. *Gregory*, 6 Blackf. 113.

The defendant held the land upon a condition subsequent, that he would, in all things substantially comply with his covenant. In such case, a failure to perform the obligation is a breach of the condition subsequent and a forfeiture of the estate, and forms a proper subject for the interference of a Court of chancery. *Jenkins* v. *Jenkins*, 3 Mon. 327.—*Scott* v. *Scott*, 3 B. Mon. 2.—*Devereux* v. *Cooper*, 11 Verm. 103.—*Hefner* v. *Yount*, 8 Blackf. 455.

Upon a careful review of the evidence, we have come to the conclusion that it is clearly established that the defendant has not substantially performed the obligation of his bond. The payment of the small pecuniary consideration was not sufficient. Manifestly, the leading consideration which moved the father to make the conveyance was to secure to himself and his wife a support in their declining years. The contract was highly advantageous to

Nov. Term, 1853.

HUNT v. BAILEY.

the son. For a very disproportionately small sum in money, and a payment for the few remaining years of the father's life of the same rent he would have had to pay to any one else for the use of land, he became the owner in fee of the farm. Even this pittance he failed to pay, and besides denies to his father the use of the dwelling on the farm in which he had lived, because it was not specifically mentioned in the bond.

The undertaking to pay the rents was the leading consideration of the deed, and without which it is evident it would not have been made. The failure to comply with that obligation worked a forfeiture of his estate.

Upon setting aside the conveyance it was proper to take an account. The defendant should be allowed for the money consideration, so far as he could prove he had paid it, with interest; for the improvements made, and all rents paid; and should be charged with the rents of the whole farm, including that portion by him cleared, from the time he went into possession of it. This is the proper and only mode of restoring the parties to their original situation.

Per Curiam.—The decree is reversed with costs. Cause remanded for further proceedings in accordance with this opinion.

R. Crawford, for the plaintiff.

J. Collins, for the defendant.

HUNT and Another *v.* BAILEY.

Where several pleas filed are substantially the same, the Court may, on motion, set aside all but one.

It is not error to refuse a motion to suppress a deposition, where no objection to the deposition is pointed out.

Nov. Term, 1853.

HUNT v. BAILEY.

Saturday, December 31.

ERROR to the *Randolph* Circuit Court.

PERKINS, J.—Replevin for a horse charged to have been wrongfully taken and detained.

Pleas, not guilty, and property in the defendants. Replication in denial of the plea of property. Jury trial, and verdict for the plaintiff. New trial granted, which likewise resulted in a second verdict for the plaintiff.

Motion for a second new trial overruled, and final judgment for the plaintiff.

This case is here upon a general assignment of error, without a brief.

It appears by the record that the Court below set aside the fourth and fifth pleas of the defendants. This was right, as they were but copies, substantially, of the first and second. The instructions given were not excepted to, nor was the refusal to give those asked, if, indeed, there was a refusal, for the record does not show what was done with the latter. No point is presented, therefore, to this Court in regard to either.

A motion was made to suppress a deposition, but no objection to the deposition was specified, and, hence, the Court rightly overruled the motion. No objection is pointed out to the deposition here. The evidence is upon the record, and is conflicting. The jury might well, and it seems did, upon two trials, infer that the horse sued for was obtained by the defendants below, from the plaintiff, by fraud.

Per Curiam.—The judgment is affirmed with costs.

T. J. Sample, for the plaintiffs.

D. Kilgore, for the defendant.

Nov. Term, 1853.

GARDNER v. THE STATE.

BRAGG v. CASON.

Proceeding by a surety against his principal, under c. 51, R. S. 1843, by notice and motion. The notice recited the recovery of judgment by *A.* against *B.*, as principal, and *C.*, as surety, in the *Union* Circuit Court, the payment of the judgment by *C.*, and the notice given by the surety to the principal to show cause, &c. *Held*, that the statute had been substantially pursued.

Saturday, December 31.

ERROR to the *Fayette* Circuit Court.

STUART, J.—This was a proceeding by a surety against his principal, under c. 51, R. S. 1843, by notice and motion. The notice recites the recovery of judgment by one *Burt* against *Bragg*, as principal, and *Cason*, as surety, in the *Union* Circuit Court, the payment of the judgment by the surety, and notifying *Bragg* to appear and show cause why, &c. *Cason* recovered in the Court below. We think the provisions of that statute—the 8th and 12th sections—have been substantially pursued.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

C. H. Test, for the plaintiff.

J. Yaryan, for the defendant.

---

4 [illegible] 126 319

4 632 Case 2 166 218

GARDNER v. THE STATE.

Every person is presumed to have a christian name until the contrary is shown.

A complaint under the act of 1852 establishing Courts of Common Pleas, for an assault and battery, did not set out the christian name of the defendant, but only the initials. *Held*, that the defendant could avail himself of the omission by motion to quash, as well as by plea in abatement.

In *January*, 1853, the R. S. of 1852 not being in force, informations for misdemeanors were not authorized by law, but only a sworn charge or complaint.

Nov. Term, 1853.

GARDNER v. THE STATE.

The refusal of the Circuit Court in a criminal case to hear more than two witnesses to the same point, cannot be supported as a rule of decision. The leaning of the courts should be to allow as wide a latitude to the defence, in criminal cases, as is consistent with a proper dispatch of the public business.

But, in most instances, the number of witnesses that shall be heard on a single point is a matter resting in the discretion of the Court, and to bring it properly within the cognizance of the Supreme Court, the facts showing an abuse of that discretion must be presented in the record.

The doctrine laid down in *Cooper* v. *McJunkin*, *ante*, p. 290, in relation to the right of teachers to chastise their pupils, adhered to.

As a matter of public policy and to prevent breaches of the peace, courts should hold a strong and stern hand over teachers who abuse their sacred and responsible position by the infliction of brutal corporal punishments.

APPEAL from the *Decatur* Circuit Court.

Saturday, December 31.

STUART, J.—The state, by her attorney prosecuting, filed a charge, verified by affidavit, against *Gardner*, for assault and battery. The charge was made at the *January* term of the *Decatur* Common Pleas. It appears that *Gardner* was a school-teacher, and the party assaulted, his pupil. While they stood in such relations to each other, a controversy arose between them about the spelling of the word "commerce." The pupil, *Stuart*, having missed in spelling the word, and refused to try again, *Gardner* became angry and commenced beating him. He wore out two whips on him, and in the progress of the chastisement administered to *Stuart* a blow or two with his fist on the head, and a couple of kicks in the face. Two witnesses for the defence, who were also pupils and present, testified negatively that they did not see the blows nor the kicks.

The cause was submitted to a jury, verdict guilty, fine 2 dollars, and judgment accordingly.

In the progress of the cause several objections were taken, which are urged here for a reversal. Among the most material are, 1. That the christian name of the defendant is not set out in the charge, but only initials. He is described as "one *A. G. Gardner*, late of said county." For this cause the defendant moved to quash the complaint. The criminal code established by the revision of

Nov. Term, 1853.

GARDNER v. THE STATE.

1852 provides that the indictment or information must contain, amongst other things, the names of the parties. Vol. 2, R. S. 1852, p. 367. But this code was not in force in *January*, 1852. *Jones* v. *Cavins*, *ante*, p. 305. Under the old system, which was still in force, the charge was equally defective. The only question is, how is the defendant to take advantage of it, by plea in abatement or by motion to quash? Had the complaint charged *Gardner* by a wrong christian name, his proper course would have been to plead in abatement. 1 Chitty Crim. L. 202. But when there is no christian name given, and no allegation that the party has not a christian name, nor that it is unknown, the defect being apparent on the face of the record, it would seem on principle that a plea in abatement was unnecessary. The office of a plea is to inform the Court of some extrinsic matter. Here the defect of name is clearly before the Court. For every person is presumed to have a christian name until the contrary is made to appear by proper averment. The question of sufficiency can in this instance be as fully raised by motion to quash as by plea in abatement. And though *Chitty* lays it down as the rule that a plea in abatement will lie in such cases, yet he adds, that for objections apparent on the face of the indictment itself, without reference to any extrinsic fact, it is more usual to move to quash. 1 Chitty Crim. L. 445.

The motion to quash was met by a counter motion to file an information in which the christian name of *Gardner* was alleged to be unknown. The Court overruled the former and sustained the latter. This was erroneous. In *January*, 1853, the R. S. of 1852 were not in force, and informations such as that filed were not authorized by law, but only a sworn charge or complaint. *Lindville* v. *The State*, 3 Ind. R. 580.

The second error complained of is, that the Court refused to hear more than two witnesses to the same point on the part of the defence. As a rule of decision this position could not be supported. The leaning of the courts should be to allow as wide a latitude to the de-

fence in criminal cases, as is consistent with a proper dispatch of the public business. So that it resolves itself, in most cases, into a matter resting in the discretion of the Court. To bring it properly within our cognizance, the facts showing an abuse of that discretion must be presented in the record. Perhaps the arbitrary course of judges at *nisi prius*, in refusing to put in the record by bill of exceptions the facts as they actually occurred, might be better guarded by legislative enactment.

The instructions given to the jury are objected to. In a recent case we had occasion to examine the law relative to the right of teachers to chastise their pupils. *Cooper* v. *McJunkin*, *ante*, p. 290.

We adhere to the doctrine there laid down. Such outrages on the child, even though he be truant and perhaps stubborn, are more than parental feeling can bear. To prevent retaliation and breaches of the peace, it becomes a matter of public policy to punish the offender. If the law in such cases is properly administered, those whose feelings are outraged will have no apology for taking redress into their own hands. They will peaceably abide the adjudication of the courts. If, on the contrary, the law is loosely and indulgently administered, the tendency is to stimulate the aggrieved to seek personal redress. As a matter of public policy, courts and juries should therefore hold a strong and stern hand over teachers who abuse their sacred and responsible position.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Scobey, for the appellant.

R. A. Riley, for the state.

Nov. Term, 1853.

Hooks v. York.

Hooks v. York and Others.

Bank notes received by a justice of the peace in payment of a judgment, are not, while in his possession, subject to levy upon an execution against the judgment-plaintiff.

To an action on the official bond of a justice of the peace for his refusal to pay over to a judgment-plaintiff bank notes received by him in payment of the judgment, it is no answer, that the notes were taken, while in his possession, upon an execution against the plaintiff.

Suits upon the official bond of a justice of the peace were required by the R. S. 1843 to be brought in the name of the state for the use, or upon the relation of, the party interested.

Saturday, December 31.

ERROR to the *Fountain* Circuit Court.

Davison, J.—Debt by the plaintiff before a justice of the peace against *Elijah York*, a justice of the peace, and his sureties, on his official bond. The bond was conditioned in the usual form, for the discharge of the duties of the justice, and for the payment over by him to the proper persons of all moneys received by virtue of his office. The breach assigned is, that the plaintiff, on, &c., recovered a judgment before said justice against one *Jackson Cochran* for 20 dollars, and costs, &c., which was by said *Cochran* paid in full to the justice; that the plaintiff, afterwards, to-wit, on, &c., at, &c., demanded the money so received, &c., but the justice failed and refused to pay, &c.

Plea, that said 20 dollars was received by the justice in current bank notes; and while the same was in his possession, to-wit, on, &c., one *William Hall*, a constable, &c., by virtue of an execution then in his hands against said plaintiff, seized and took said bank notes into his possession as the plaintiff's property, &c.

To this plea there was a general demurrer. The justice sustained the demurrer and gave judgment for the plaintiff. The defendants appealed.

In the Circuit Court, the cause was submitted on the demurrer to the plea. The Court overruled the demurrer and rendered judgment for the defendants.

The record presents this question: Were the bank notes

subject to the execution? We think they were not. It has been decided that money collected by a sheriff on execution cannot, while in his possession, be levied on. While it remains there it is in the custody of the law. It does not belong to the judgment-creditor until it is paid over to him. Therefore it is not liable to execution. *Turner* v. *Fendall*, 1 Cranch 117.—*Wood* v. *Wood*, 4 Adolph. and Ellis 397.—*Winton* v. *The State*, *ante*, p. 321.—*Ross* v. *Clark*, 1 Dall. 254. In the case last cited, "the defendant had obtained a judgment against *Ross*, who paid the money into the hands of the prothonotary and then attached it. On rule to show cause, the Court quashed the writ, because the money in the hands of the prothonotary was to be considered in the same state as if it had been paid into the hands of the sheriff." There is no reason why the principle laid down in the cases above cited should not apply to the one under consideration. It was no doubt the duty of the justice to pay the bank notes over to the judgment-creditor. And, in our opinion, that duty was not superseded by the levy of the execution. *Sibert* v. *Humphries*, *ante*, p. 481.

The present suit, however, cannot be sustained. It is founded upon an official bond made payable to the state. The suit was brought in the name of the person interested, &c., when it should have been instituted in the name of the state for his use, or on his relation. R. S. 1843, c. 40, ss. 131, 132.

Per Curiam.—The judgment is affirmed with costs.

C. Tyler and *L. Wallace*, for the plaintiff.

---

4 637
165 150

HULL *v.* KIRKPATRICK.

4 637
170 654

A count in case charged that *A.* in an exchange of horses with *B.* falsely represented his, *A.'s*, horse to be sound, when in truth he was not sound, but, at the time of the exchange, was and still is unsound, having a dis-

Nov. Term, 1853.

HULL v. KIRKPATRICK.

ease called glanders, which *A.* then knew, and that *A.*, though requested, had refused to deliver to *B.* the horse received of him. Plea, that *B.* never delivered or tendered to *A.* the horse received of him in exchange, although *A.*, on, &c., at, &c., tendered back the horse which he got of *B.*; but he then and there refused to receive the horse, &c. *Held*, that the plea was properly rejected on motion.

A. in an exchange of horses with *B.* was asked by *B.* what was the matter of his, *A.'s*, horse, the horse appearing to be diseased. *A.* replied that the horse "had the distemper a little." *Held*, that the statement was in effect a representation that the horse was not otherwise diseased.

The refusal of the Circuit Court to grant a motion for a new trial on account of newly discovered evidence, will not be disturbed where such evidence does not seem obviously sufficient to change the result upon a new trial.

In an action of tort, where the damages laid are over 50 dollars, but the recovery is for a less sum, the plaintiff is, under the R. S. 1843, entitled to costs.

Saturday, December 31.

ERROR to the *Blackford* Circuit Court.

DAVISON, J.—This was an action of trespass on the case by *Kirkpatrick* against *Hull*. The declaration contains three counts. The first charges that *Hull*, in a certain exchange of horses with *Kirkpatrick*, falsely represented his, *Hull's*, horse to be sound, when in truth, &c., he was not sound, but at the time of said exchange was, and still is, unsound, having a disease called glanders. The second count is similar to the first, with this exception: it alleges that *Hull*, when the exchange took place, knew his horse to be unsound. The third is, in substance, the same as the second, excepting an averment that *Hull*, though requested, had refused to redeliver to *Kirkpatrick* the horse received of him.

The general issue was pleaded to the declaration. To the third count there was a second plea, that *Kirkpatrick* never delivered or tendered to *Hull* the horse received of him the in exchange, although *Hull*, on the 13th of *April* 1849, at, &c., tendered back the same horse which he got of *Kirkpatrick*, but he then and there refused to receive said horse, &c.

The second plea was, on motion, rejected. This ruling of the Court was correct. The defence set up by the plea constitutes no answer to the third count, nor was it

adapted to the nature of the action. Therefore it was a nullity.

The cause was submitted to the Court by consent. The Court found for the plaintiff below, and assessed his damages at 30 dollars. Motion for a new trial overruled, and judgment on the finding of the Court.

The refusal to grant a new trial is alleged to be erroneous—1. Because the averments in the declaration were not sustained by the proofs. 2. Because the facts proved do not present any cause of action. 3. That the defendant was entitled to a new trial on account of newly discovered evidence.

The evidence shows that a short time before the exchange of horses, *Hull*, the defendant below, was told by two persons that his horse had the glanders. When the exchange took place, the plaintiff asked the defendant "what was the matter with the horse?" In answer the defendant stated, "the horse had the distemper a little." The plaintiff replied, he cared nothing for that. Three witnesses, two of whom professed to have skill in the diseases of horses, testified that the defendant's horse at the time of the trade was, and still is, diseased with the glanders. Two other witnesses, one of whom professed a like skill, deposed that he was not afflicted with that disease—that it was contagious, and the defendant's horse had been used and fed with other horses, without any of them contracting it; that persons unskilled in the diseases of horses could not distinguish the distemper from the glanders. It was shown that the horse traded to the defendant was worth between 20 and 30 dollars; that the one in question, if sound, would be worth 50 dollars; and that in his present condition he was of no value.

It is insisted that the defendant's statement, namely, "that the horse had the distemper a little," did not amount to a representation that he was sound. This view is not strictly correct. The statement does not appear to have been given as a mere opinion or belief; and whether it was understood by the parties as a representation of soundness, was for the Court trying the cause to deter-

Nov. Term, 1853.

Hull v. Kirkpatrick.

mine from all the facts and circumstances connected with the transaction. We think it was evidently intended by the defendant, and understood by the plaintiff, as a representation that the horse was sound. The appearance of the horse no doubt indicated that he might have the distemper. This the parties do not appear to have considered important; but the statement itself, in effect, represented that the horse was not otherwise diseased. In our opinion, the averment that the defendant represented his horse to be sound, was substantially proved. Whether the horse really had the glanders, or if he had, whether the disease was known to the defendant at the time of the exchange, are points upon which the evidence is conflicting; but, it seems to us, the preponderance is against the defendant.

In support of the motion for a new trial, the defendant filed two affidavits—his own and the affidavit of one *Smith Wrixson*. The affidavit of *Wrixson*, in effect, states, that he considered himself a judge of the diseases of horses: that he had just examined the horse in controversy, and, in his, *Wrixson's* opinion, the horse was not diseased with the glanders; that he had known the horse about six years ago, and at that time the horse was afflicted in the same manner that he is now.

The Circuit Court, in deciding the motion for a new trial, doubtless considered the newly discovered evidence in connection with that given on the trial. By overruling the motion, the Court, in effect, decided that *Wrixson's* testimony, if produced, would not change the preponderance. With that decision we are not disposed to interfere. To justify us in disturbing the opinion of the Circuit Court, the sufficiency of the newly discovered evidence to change the result upon a new trial, should appear obvious. Such conclusion is not shown by the record. The motion, therefore, was properly overruled.

The judgment in this case being for 30 dollars only, it is contended that the defendant should have recovered costs. This is a mistake. The present action is founded in tort, the damages are laid at an amount over 50 dol-

lars, and the Circuit Court had exclusive jurisdiction of the cause. R. S. 1843, c. 47, s. 2. The damages assessed did not authorize a judgment against the plaintiffs for costs. In debt, assumpsit, and covenant, "wherein the sum *due* or *demanded* exceeds 50 dollars," the rule is different. 8 Blackf. 196.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

W. March, for the plaintiff.

J. H. Holliday, for the defendant.

DUNLAP *v.* JONES.

A judgment, where the cause is tried by the Court, can be set aside only on the same preponderance of evidence that would invalidate a verdict. Where the record does not profess to set out all the evidence, its insufficiency to support the judgment cannot be assigned for error.

ERROR to the *Clark* Circuit Court.

Saturday, December 31.

DAVISON, J.—*Jones* sued *Dunlap* in covenant. The declaration sets forth a contract sealed by the parties, whereby *Dunlap*, in consideration of 200 dollars, agreed with *Jones* to construct for him a dwelling-house, in a workmanlike manner. The payment of the money is averred and certain breaches specifically assigned. Plea, performance, with an agreement that all special matter should be admissible under it. The cause was submitted to the Court by consent. The Court found for the plaintiff below. Motion for a new trial overruled. Judgment on the finding of the Court.

Whether the proof was sufficient to sustain the finding of the Court is the only question presented by the record.

The judgment, where the cause is tried by the Court "can be set aside only on the same preponderance of

Nov. Term, 1853.

Orth v. Sharkey.

evidence that would invalidate a verdict." 4 Blackf. 311.—5 *id.* 108.—6 *id.* 507. But the record does not profess to set out all the evidence given on the trial. Therefore its insufficiency to support the judgment cannot be assigned for error. 5 Blackf. 146.—8 *id.* 196. However, from what is set out, the right of *Jones* to recover is sufficiently shown.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

H. F. Smith, for the plaintiff.

W. T. Otto, for the defendant.

ORTH and Another *v.* SHARKEY.

The consideration of a note may be proved by a conversation between the parties when it was given.

Saturday, December 31.

APPEAL from the *Union* Circuit Court.

DAVISON, J.—*Orth* and *White* sued *Sharkey* before a justice of the peace, upon a note for the payment of 37 dollars and 60 cents. The note was payable to one *George Parker* and by him assigned to the plaintiffs. Plea, that the defendant, when he gave the note, was the owner of a saw-mill propelled by water, and used therein a certain water-wheel for the propelling of the machinery thereof; that *Parker*, falsely, &c., represented that he was the patentee of a certain wheel for propelling machinery by water, commonly called "the *Parker* Wheel;" that the wheel so used by the defendant was an infringement of his, *Parker's*, patent; and the defendant was liable for the use of said wheel. The defendant, believing these representations, executed the note sued on, when in truth *Parker* had no title, as patentee, to the defendant's wheel, &c. Replication in denial of the plea.

The defendant was also entitled to the general issue. The justice gave judgment for the plaintiffs. The defendant appealed.

In the Circuit Court there was a verdict for the defendant. Motion for a new trial overruled. Judgment on the verdict, &c.

Upon the trial, the defendant introduced one *Reed*, who testified that he was called on by the defendant and *Parker's* agent, and requested to decide whether a wheel then in the defendant's mill, was an infringement of *Parker's* patent. This the witness declined doing. *Parker's* agent then insisted that said wheel was an infringement of that patent—that the question of such infringement had been determined by suits in favor of *Parker*. He referred to some decisions. Whereupon it was agreed that the defendant should give his note for 37 dollars and 60 cents, payable in twelve months, and *Parker* should make and deliver to him a deed of assignment for the right of making and using, &c., one wheel of *Z. & A. Parker's* combined percussion and reaction water-wheel. If it turned out that the defendant's wheel was an infringement of said patent, the note was to be paid; if not, it was to be void. The defendant was to furnish proof that his wheel was not an infringement, &c. The agreement being thus made, the note in question was given, and a deed of assignment accordingly executed.

A bill of exceptions, taken by the plaintiffs, states that they, at the proper time, objected to the introduction of *Reed's* testimony, but the Court overruled the objection, and permitted it to be given for the purpose of showing the consideration of the note, and not for the purpose of contradicting its terms. The defendant gave in evidence, the deed of assignment executed to him by *Parker;* also, a schedule and specification of *Parker's* patent; and thereupon tendered said deed to the plaintiffs. He then introduced one *Martz*, who testified that he was a millwright; that he put up the defendant's mill in the year 1837; that he had the right to sell and use the spiral vent wheel patented by one *Clark Wilson;* the defendant's

Nov. Term, 1853.

Orth v. Sharkey.

wheel is made according to the plans and specifications of the spiral vent wheel; that he had seen wheels similar to the defendant's, thirty years ago. Another witness testified that he had seen the spiral vent wheel forty years ago. The above is believed to be the substance of the evidence given in the cause.

The plaintiffs insist that their objection to *Reed's* testimony should have been sustained. So far as his evidence conduced to prove the consideration of the note, it was properly admitted. We infer from the bill of exceptions that such parts of it as tended to set up a verbal contemporaneous agreement varying the terms of the note, were excluded from the consideration of the jury.

However, this judgment must be reversed. The real consideration of the note in suit, was the compromise of a claim against the defendant, for which he considered there was at least some foundation. The representations of *Parker*, no doubt, led to the compromise and the execution of the note; but it was not shown that these representations, or any part of them, were untrue. None of the witnesses profess to be acquainted with *Parker's* patent, or the principle upon which it is governed. The circumstance that the defendant's wheel was made according to the specifications of another patent, does not admit of the inference that his wheel is not an infringement of *Parker's* patent. We are decidedly of opinion that the evidence set out in the record, was insufficient to sustain the defence set up against the note. 8 Blackf. 181. A new trial should have been granted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Yaryan, for the appellants.

J. S. Reid, for the appellee.

PAYTON and Another *v.* SECUR and Another.

A special plea which merely denies allegations in the declaration which the plaintiff would on the general issue be bound to prove in support of his case, is bad on special demurrer, as amounting to the general issue.

A promissory note was executed and put into the hands of *A.* to be delivered to the payees upon their surrending up a letter of credit which they held to secure a debt of a third person. *A.* delivered up the note to the payees without receiving from them the letter of credit, and, having never surrendered it, they brought suit on the note. *Held*, that the note was void for want of consideration.

ERROR to the *Huntington* Circuit Court.

Saturday, December 31.

DAVISON, J.—Assumpsit by the defendants in error against the plaintiffs in error upon two promissory notes, each for the payment of 250 dollars. The defendants pleaded two pleas: 1. That said notes were never delivered by them to the plaintiffs. 2. The second plea alleges, substantially, that the defendants, with others, on the first of *April*, 1851, at *Huntington* County, executed a letter of credit, and delivered it to one *Leonard Billey*, the object of which was to enable him to buy goods on credit in the State of *Ohio*. *Billey*, afterwards, on the 15th of said month, purchased of the plaintiffs, upon the faith of said letter, and on credit, a stock of goods amounting to 500 dollars. On the 23d of *August*, 1851, *Billey*, being in failing circumstances, proposed to the defendants that if they would execute their notes to the plaintiffs, he would cover the amount by a sale of goods to them out of his stock then on hand, and lift the letter of credit to be canceled. The defendants agreed to this proposition; the goods were, accordingly, delivered to them; and they signed the notes now in suit. The plaintiffs being in possession of said letter of credit, it was agreed that the surrender of it should be the consideration upon which they were to receive the notes. The notes were then, by agreement between the defendants and *Billey*, placed in the hands of one *F. A. Yahne*, to be by him taken to *Ohio*, where the plaintiffs resided, and delivered to them upon the surrender to him, *Yahne*, of said letter of credit. This he failed and refused

Nov. Term, 1853.

PAYTON v. SECUR.

to do, but wrongfully, &c., held the notes in his possession until the 21st of *December*, 1851. At this date the plaintiffs visited said county for the purpose of settling the business. They refused to give up the letter of credit, stating that they would rather have it than the notes. But *Yahne*, afterwards, with an intent to defraud the defendants, delivered said notes to the plaintiffs, without requiring them to surrender said letter of credit, and it still remains in their possession; wherefore the notes are void, &c.

To each of the pleas there was a special demurrer sustained.

The first plea merely denies certain allegations in the declaration which the plaintiffs, on the general issue, would have been bound to show in support of their case. It was, therefore, objectionable on special demurrer.

The demurrer to the second plea states three causes, viz.: 1. That it consists of matter of fact amounting to the general issue. 2. It is argumentative. 3. Because it sets up matters with which the plaintiffs are in nowise connected.

None of these causes are well assigned. Then, the demurrer presents this inquiry: Does the second plea constitute a defence to the action? We think it does. When the notes were signed, it was expressly agreed between the defendants and *Billey* that their delivery to the plaintiffs, and the surrender of the letter of credit, should be simultaneous. To this agreement the plaintiffs never assented; they even refused to comply with it. Nor did the defendants ever consent to the delivery of the notes on any condition other than that agreed on. Therefore the plaintiffs were not entitled to possession of the notes. If one party does not accede to a promise as made, the other party is not bound by it. Chitty on Cont. 9. *Tuttle* v. *Love*, 7 Johns. R. 470. The notes when offered to the plaintiffs were, in effect, nothing more than a proposal to alter a subsisting liability. This has not been done. The letter of credit is still in their possession and in full force. Without its surrender the plaintiffs could have no title to the notes. They went into their possession without any

consideration moving from them, and are, on that account, void. *Stewart* v. *The Trustees*, &c., 2 Denio 403.—*Wood* v. *Edwards*, 19 Johns. R. 205.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. H. Colerick, for the plaintiffs.

J. R. Coffroth, for the defendants.

KRUTZ *v.* THE STATE.

A. having been indicted in twelve cases for retailing spirituous liquor, the indictments were all by consent submitted, at the same time, for trial to a jury. The testimony of a witness was heard, the jury found the defendant guilty upon nine of the indictments and assessed a separate fine in each case, and judgments were rendered accordingly. *Held*, that a separate jury fee, docket fee, and witness fee were taxable on each of the judgments against the defendant.

Saturday, December 31.

ERROR to the *Switzerland* Circuit Court.

DAVISON, J.—This was a motion to tax costs.

The record shows that *Krutz*, the defendant below, was indicted in twelve cases, for retailing spirituous liquor without license. By consent the indictments were all, at the same time, submitted for trial to a jury. Upon nine of the indictments the jury found the defendant guilty, and assessed a separate fine in each case. Judgments were rendered in accordance with the several verdicts.

The defendant moved the Court to tax for costs against him, in said nine causes, but one jury fee, one docket fee, and one witness fee, there having been only one witness sworn, and but one trial had in said cases. This motion the Court overruled, and allowed as cost against him a jury fee, docket fee and a witness fee in each case.

Nov. Term, 1853.

NOSSAMAN v. NOSSAMAN.

The ruling of the Court was correct. There is a statutory provision which enacts that, "In all cases of a conviction, the costs of prosecution shall be included in the judgment rendered against the convicted person, unless the Court or jury trying the cause expressly find otherwise." R. S. 1843, c. 54, s. 62. Against the defendant there was a conviction in each of the nine cases, and several judgments were accordingly rendered. It follows that costs were properly included in each judgment.

Per Curiam.—The judgment is affirmed with costs.

J. G. Marshall and *D. Kelso*, for the defendant.

R. A. Riley, *N. B. Taylor* and *J. Coburn*, for the State.

NOSSAMAN and Others *v.* NOSSAMAN.

A marriage may be presumed from cohabitation and reputation; but the presumption, like other presumptions of fact, may be rebutted.

Where a cohabitation is shown to have been known by the parties to be adulterous in its origin, a lawful wife being then alive, no presumption of the death of, or a divorce from, such wife will be indulged in favor of the guilty parties.

Affirmative evidence is necessary in such a case to establish the death of, or a divorce from, the lawful wife.

It will not be presumed, in order to establish a presumptive marriage, that either the parties or officers violated the law.

The clerk of one county could not, under the R. S. 1843, issue a license for the marriage of a female who was a resident of another county.

A release of real estate is not valid unless a grantee is in some way designated.

Saturday, December 31.

ERROR to the *Marion* Court of Common Pleas.

ROACHE, J.—This was a bill in chancery for partition by *Wellington Nossaman* and others against *Adam Nossaman*.

A portion of the complainants claim that they are entitled to the partition, as the only legitimate children and heirs of *John Nossaman*, deceased, who died intestate, to

the exclusion of the defendant, *Adam Nossaman*, whom they charge to have been illegitimate. But if they shall be found not to be the legitimate children of the intestate, it is alleged that *Sidney Belcher*, another of the complainants, who is a sister of the defendant, is entitled as the next of kin, on the ground that, admitting *Adam* be the only legitimate child, he is estopped from setting up any claim, by the following instrument of writing:

"*Indiana*, *Marion* County, *Oct.* 4, 1842.—I, *Adam Nossaman*, do hereby acknowledge to have received the distributive share of my father's estate, *John Nossaman*, and hereby release all my claim to his real and personal estate which he now has, or hereafter may have. Witness my hand and seal this day and year first above written. *Adam Nossaman*, (seal.) Witness, *Nathaniel M. Grew*, *Lewis C. Lewis*." The writing was acknowledged before *Lewis C. Lewis*, as recorder, and recorded *October* 4, 1842.

Adam Nossaman answered, denying that any of the complainants were entitled as children or heirs at law of the intestate, and denying that the complainants, who claimed as the children of the intestate, were legitimate, and asserting that the writing purporting to be a release was a nullity. He also filed a cross-bill alleging himself to be the only legitimate child of the decedent, and, as such, entitled to the whole estate.

The Court below dismissed the complainants' bill.

The material facts, as we collect them from the bill, answers, and depositions, are as follows:

In 1809, *John Nossaman* was lawfully married to *Abigail Wylie*, in *Monroe* county, *Virginia*. They lived together for some years there, and had issue one son, the defendant, *Adam Nossaman*. A few years after his birth, they separated, and never afterwards lived together.

About 1815, *John Nossaman*, and *Rica Medows*, who is the mother of the *Nossamans* complainants, commenced living together in adultery, in *Monroe* county, and so continued to live there till 1820, when they removed to the west; lived some time in another part of *Virginia*, afterwards in *Kentucky*, and in 1831 or 1832 removed to *Ma-*

Nov. Term, 1853.

NOSSAMAN v. NOSSAMAN.

rion county, *Indiana*, where they continued to live during the remainder of their lives.

John Nossaman died in *July*, 1849, *Rica* in *July*, 1848. *Abigail Nossaman* resided in *Monroe* county, *Virginia*, until her death, the date of which is not precisely established, but was not probably earlier than *August*, 1847.

It was proved that the decedent and *Rica*, up to the time of their leaving *Virginia*, were regarded as living in adultery. After their removal to *Indiana*, they were reputed among the neighbors to be husband and wife.

Contradictory statements appear to have been made by the decedent relative to his marriage with the said *Rica*. He uniformly spoke of *Abigail* as having been his lawful wife. To some witnesses he admitted he had never been married to *Rica*. To others, he spoke of having been married to her in *Kentucky*.

Robert B. Duncan testified that he had been clerk of the *Marion* Circuit Court from 1834 to 1850, and had known the decedent since his removal to *Marion* county, and had no recollection of issuing a marriage license to him to marry said *Rica*; that during said period he kept a marriage record, according to law. It was proved by the deputy clerk that he had made diligent search in the office, from the year 1831, inclusive, and that no entry of such marriage appeared on the marriage record.

The complainants contend that the long cohabitation of their father and mother, and the fact that they were reputed in *Marion* county, where they resided the latter years of their lives, to be husband and wife, raises a presumption of a marriage having taken place, and that consequently their children are to be presumed legitimate.

It is true that cohabitation and reputation furnish sufficient ground for presuming a marriage in fact to have taken place; but, like all other presumptions of fact, it is liable to be rebutted. It is very clear that the presumption could not arise during the lifetime of the lawful wife, because both the decedent and *Rica* knew their cohabitation to be adulterous in its inception, and knew they could not be lawfully married until the impediment of the

subsisting marriage was removed. In such case no presumption, either of death or divorce, can be indulged in favor of the guilty parties. *Crane* v. *Crane*, 5 Greenl. 213. If a marriage in fact had taken place, in such case it would be necessary to be shown affirmatively that it had been preceded by the death or divorce of the lawful wife.

In the present case no divorce is shown. It appears that *Abigail*, the lawful wife, died in 1848, about one year prior to the death of *Rica*. This is the only period during which a lawful marriage could have taken place. In the the absence of proof to the contrary, the presumption might be indulged that the parties had been lawfully married during that year. But, as we think, all the presumptions of an actual marriage arising as to that period are rebutted by the testimony of the clerk and his deputy. It is not to be presumed, in order to establish a presumptive marriage, that either the parties or the officers violated the law. It is shown that during all the period in question, the said *Rica* was a resident of *Marion* county. It was not lawful for the clerk of any other county to issue a license for her marriage. R. S. 1843, p. 595, sec. 9. It was also the duty of the clerk to keep a record of the marriage. It is affirmatively shown that no such record is found in the office of the clerk of *Marion* county.

But it is insisted that if the complainants, *Nossamans*, are not the legitimate children of the intestate, *Sidney Belcher*, his sister, is the lawful heir, for the reason that *Adam Nossaman* is estopped by his release from setting up any claim.

We do not examine the question as to what would be the legal operation of a valid release to the father by a son of his "claim to the estate" of his father, for the reason that we consider the instrument claimed to be a release void for uncertainty. Parties are as necessary to a release, as to any other contract relating to the transfer of the title to real estate.

No title is conveyed, unless the grantee is in some way designated. *Jackson* v. *Cory*, 8 Johns. R. 385.—*Garnett* v. *Garnett*, 7 Mon. 345.—2 Hil. Real Prop. 334. The instru-

Nov. Term, 1853.

SHERRY v. EWELL.

ment being void, is totally inoperative for any purpose, and cannot be set up by way of estoppel.

Per Curiam.—The decree is affirmed with costs.

O. H. Smith and *S. Yandes*, for the plaintiffs.

J. Morrison and *S. Major*, for the defendant.

SHERRY *v.* EWELL.

It is too late, after a motion in arrest of judgment, to move for a new trial.

Saturday, December 31.

ERROR to the *Delaware* Circuit Court.

ROACHE, J.—Case by *Ewell* against *Sherry* for debauching his daughter, whereby he was deprived of her services. Damages 1,000 dollars. *Sherry* pleaded the general issue. Trial by jury, and verdict for 350 dollars.

4 652
170 539

4 652
171 641

Upon the coming in of the verdict the defendant below moved in arrest of judgment, and for a new trial. No grounds for the arrest are pointed out, and we perceive none in the record, and that motion was correctly overruled.

After the motion in arrest, the motion for a new trial came too late. *Rogers* v. *Maxwell*, *ante*, p. 243.

Per Curiam.—The judgment is affirmed, with 10 per cent. damages and costs.

J. S. Buckles and *W. March*, for the plaintiff.

T. J. Sample and *D. Kilgore*, for the defendant.

THE STATE *v.* YOUNT.

Nov. Term, 1853.

The Supreme Court has no jurisdiction under s. 119, p. 377, 2 vol. R. S. 1852, to correct an alleged error in the finding of the Court, in a criminal cause, where the defendant has been acquitted.

APPEAL from the *White* Court of Common Pleas.

Saturday, December 31.

STUART, J.—This was a prosecution for retailing spirits without license. Trial by the Court, finding not guilty, and judgment accordingly. The state sets out the evidence in a bill of exceptions, and brings the case here to correct the alleged erroneous finding of the Court below. No question of law is reserved—nothing submitted but the correctness of the finding on the evidence.

The state labors under an entire misconception of the powers and duties of this Court, under the 119th sec. R. S., 2 vol., p. 377. The case is not embraced in any law that we are aware of. This Court has therefore no jurisdiction.

Per Curiam.—The appeal is dismissed.

L. Reilly, for the state.

A. W. Sill, for the appellee.

THE STATE BANK *v.* DAVIS.

STATE BANK v. DAVIS.

4b 653
138 487

The surety on a promissory note took a mortgage upon real estate from the principal, by way of indemnity. A judgment having been afterwards obtained upon the note, and an execution having been returned *nulla bona*, the assignee of the judgment afterwards obtained a decree for the sale of certain land, to satisfy the judgment, which the surety had conveyed to a third person to defraud his creditors. The land was sold upon the decree and the judgment satisfied out of the purchase-money. The principal having sold the mortgaged premises to a third party, after the mortgage was recorded, the surety filed his bill of foreclosure to recover the amount of the decree. The grantee was a party in the cause wherein the land fraudulently conveyed by the surety had been ordered to be sold. *Held*, that the bill would lie.

Nov. Term, 1853.

STATE BANK v. DAVIS.

Saturday, December 31.

APPEAL from the *Tippecanoe* Court of Common Pleas.

ROACHE, J.—*James Davis* filed a bill in chancery against *Webb* and *Shoemaker*, the *State Bank*, and numerous other parties.

The *State Bank* alone prosecutes this appeal, and it is unnecessary to take any notice of those parties whose rights are not involved in the appeal.

The record is very voluminous; but we shall state only those facts, collected from the bill, answers, exhibits, and depositions, which bear on the question raised by the parties in this Court.

On the 16th of *January*, 1838, *Davis* signed two notes, as security for *Webb* and *Shoemaker*, to *Spofford, Tilletson, & Co.*, due in three and four months, amounting to 1,299 dollars and 12 cents, and on the 5th of *April*, 1838, *Webb* and *Shoemaker* executed a mortgage on real estate owned by them jointly, to *Davis*, and five other persons, also sureties for them to a large amount, in order to secure them against their liabilities as such sureties. And on the same day *Webb* made a mortgage of lands owned by him separately, to the same parties, for the same purpose. Both mortgages were duly recorded.

On the 25th of *November*, 1838, *Webb* and *Shoemaker*, being largely involved in debt and in failing circumstances, made an assignment of their property, real and personal, including the mortgaged premises, to *William M. Jenners*, in trust for the payment of their debts, among which was a note to the bank of 9,000 dollars, upon which *Davis* was an indorser, the proceeds of which had been used to pay off judgments and liens on the lands of *Webb* and *Shoemaker*.

Jenners, afterwards, as trustee, made a sale, and the bank bid off and bought a portion of the land embraced in the mortgages of the 5th of *April*, 1838.

The only interest the bank has in this suit arises from this purchase.

On the 18th of *February*, 1839, a judgment was rendered against *Webb* and *Shoemaker*, and *Davis*, on the notes of *Spofford, Tilletson, & Co.*, for 1,361 dollars and 12

cents. An execution was issued and was returned *nulla bona*.

Subsequently, in 1845, *William K. Rochester* became the purchaser and assignee of the judgment of *Spofford, Tilletson, & Co.*, and also of another judgment against *Davis, Webb*, and *Shoemaker*, for 1,316 dollars and 86 cents, in favor of *Horatio J. Harris*.

In *August*, 1848, *Rochester* filed a bill in chancery in the *Tippecanoe* Court of Common Pleas, against *Davis, Humphrey F. Davis*, his son, *Elijah Godfrey*, and others, alleging that in 1834 said *Davis* was the owner, by purchase, of a lot of school land, for which he held the school commissioner's certificate, having paid one-fourth of the purchase-money; that in 1840, *Davis*, still being the holder of the certificate for the school land, for the purpose of defrauding his creditors, transferred it to his brother-in-law, the said *Godfrey*, without any consideration, and having paid the balance of the purchase-money, procured the school commissioner to make the conveyance to *Godfrey;* that *Godfrey* retained the deed without recording it, till 1834, when, at the instance of *Davis*, he conveyed the land to the said *Humphrey F. Davis*. Answer generally denying the fraud.

Upon the final hearing the Court decreed that the conveyances were void as against creditors, and ordered the land to be sold to satisfy the claims of which *Rochester* was the assignee. The land was accordingly sold, was bid off by *Rochester*, and conveyed to him.

The object of the bill in the present case, is to foreclose the mortgage of *Davis* against *Webb* and *Shoemaker*, and to subject that portion of the land bought by the bank at the trustee's sale, to the payment of the *Spofford* and *Tilletson* claim, which was embraced in the mortgage. *Davis* insists he is entitled to this relief, on the ground that the debt of *Spofford, Tilletson, & Co.*, against the payment of which the mortgage of *Webb* and *Shoemaker* was designed to secure him, had been paid by him, by reason of the decree in the case of *Rochester*, assignee,

Nov. Term, 1853.

STATE BANK v. DAVIS.

&c., against him, subjecting the lot of school land to sale for that purpose.

The Court below decreed in accordance, with the prayer of the bill, a foreclosure of the mortgage, and ordered a sale of the mortgaged premises.

It is contended, on behalf of the appellant, that *Davis* is not entitled to claim the indemnity secured to him by the mortgage from *Webb* and *Shoemaker*, for the payment of the debt to *Spofford, Tilletson, & Co.*, because, as counsel insist, his fraudulent conveyance divested him of all title in the school land, and estops him from claiming that the payment of the debt by a sale of the land was a payment by him.

A number of authorities are cited in support of this position; but are not, as we conceive, applicable to the case. They go to establish the familiar principle that a fraudulent deed is valid as against the grantor and his heirs, and is void only as against a creditor, and that a Court of Equity will not lend its aid to relieve the grantor, in such case, from the legal consequences of his fraud. *Davis*, in this case, is not seeking to set aside his own fraudulent act. That was set aside and annulled, against his will, by a decree of the Court. He claims that the payment of the debt, against which he was indemnified by the mortgage, by a sale of the land so ordered by the Court to be sold, was such a payment by him as to entitle him to enforce his indemnity.

No question arises here between the fraudulent grantor and his grantee. A controversy between them might present the case in a very different aspect. The case of *The Bank of the United States* v. *Burke*, 4 Blackf. 141, is cited with confidence. The point decided there was, that where a conveyance was set aside at the suit of a creditor, on the ground of fraud, the surplus remaining after the payment of the debt, belonged not to the fraudulent grantor, but to his grantee. This does not meet the question. It is not whether a fraudulent conveyance is valid as between the parties to it, nor whether, in case of

its being annulled at the suit of a creditor, the grantor is entitled to a surplus remaining after the payment of the debt; but whether, when the debt has been paid by a sale of the property, the grantor is entitled to a credit for the payment.

Justice *Story*, in speaking of the effect of conveyances void for fraud as against creditors, says, "a conveyance of this sort, (it has been said with great force) is void only as against creditors, and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent, and this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands." 1 Eq. Jurisp., sec. 371.

The principle on which Courts of Equity proceed in such cases is, that the title of the debtor, to the extent of the debt, and for the purpose of paying it, is not divested by his conveyance. As against the creditor he does not, and cannot, convey his title.

What was the effect then of the decree of the Court on the bill filed by *Rochester* against *Davis?* The land was decreed to be sold to satisfy the debt, because, for that purpose, it was *Davis's* land. If the debt was satisfied by the sale of *Davis's* land, it follows that he is entitled to the benefit of the payment. And if he has paid the debt, he is entitled to the benefit of his mortgage security.

It cannot be said *Davis* is seeking to avail himself of his own fraud. There is no pretence of any fraud, in the transaction between him and *Webb* and *Shoemaker*. That was fair and *bona fide*. The sale of his land, and the application of its proceeds to the payment of the debt, was the act of the Court. They directed his debt to be paid by property, which, by the decree, was ascertained to be his for that purpose.

This view does not conflict either with the authorities or with principle. It gives to the statute of frauds its full operation in regard to the rights of the fraudulent grantor and grantee, leaving the conveyance in full force as between them, subject to be rescinded only at the suit

Nov. Term, 1853.

STATE BANK v. DAVIS.

of a creditor, to the extent of his debt and no further; and only gives to such rescission the legitimate consequences belonging to it, in accordance with equally familiar principles.

As before observed, the rights existing between the fraudulent grantor and grantee are not involved. The appellant here does not stand in a relation to raise that question. She stands in no better position than would *Webb* and *Shoemaker*. She claims her title to the land by a purchase under the latter, made subsequent to the recording of the mortgages sought to be foreclosed, and was, therefore, a purchaser with full notice of *Davis's* rights. She was, besides, a party to the suit in which the fraudulent conveyances were decreed to be void. She is, therefore, chargeable with full notice of all the facts. She can assert no right or claim which might not have been asserted by *Webb* and *Shoemaker*, in case they had not made the deed to *Jenners*, as trustee, under which the bank purchased.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

A. S. White, *W. M. Jenners*, and *H. W. Chase*, for the appellant.

Z. M. Baird and *J. M. Reynolds*, for the appellee.

END OF NOVEMBER TERM, 1853.

AN INDEX

TO THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A.

ABATEMENT.

See COMPLAINT, 1.

ACCOMPLICE.

See CRIMINAL LAW, 4. JUDGMENT, 5.

A jury may convict a person of burglary upon the testimony solely of an accomplice.—*Dawley* v. *The State*, 128

ACCORD AND SATISFACTION.

SEE PROMISSORY NOTE, 14.

An accord, to be pleaded in bar, must have been executed.—*Harbor* v. *Morgan*, 158

ACCOUNT.

See VENDOR AND PURCHASER, 10.

ADEQUACY OF PRICE.

See INADEQUACY OF PRICE.

ADMINISTRATOR'S SALE.

See EXECUTORS AND ADMINISTRATORS, 2.

1. An order for the sale of real estate upon an administrator's petition for the non-payment of debts, is a nullity, where it appears by the record that the heirs did not receive actual or constructive notice of the suit; and a sale under such an order is void.—*Babbitt* v. *Doe d. Brush et al.*, 355

2. The sale not being merely erroneous but void, ejectment will lie against the purchaser, without any proceeding to reverse the order. *Ibid.*

3. The term "competent jurisdiction," as employed in s. 27, c. 29, R. S. 1843, means jurisdiction of the person as well as of the subject matter. *Ibid.*

4. That section only operates prospectively. *Ibid.*

5. The petition of an administrator to sell lands for the payment of debts, described the land as follows: "South-east quarter of sect. 19, T. 12: 9," and did not state the county or state in which the land was situate. *Held*, that the description was insufficient.—*Weed et al.* v. *Edmonds*, 468

6. A petition of this kind was required by the R. S. 1843, to be verified by the oath of the administrator. *Ibid.*

7. A party by contesting such a petition will be presumed to have waived such verification, but he will not if he did not appear. *Ibid.*

8. The rule in equity that the case made must be consistent with the bill, applies also to such a proceeding. *Ibid.*

AD QUOD DAMNUM.

See NUISANCE, 5.

ADVERSE POSSESSION.

See EJECTMENT.

1. An adverse possession, to confer title, must, under the R. S. 1843, have been exclusive and continuous for twenty years, under such circumstances as show the party to have been occupying upon a claim of ownership in himself of the premises.—*Law et al.* v. *Smith et al.*, 56

2. The possession of an execution-defendant is not adverse to the purchaser under the execution. *Ibid.*

3. If a person enter upon land under a conveyance purporting to convey the legal title, and continue to occupy for a period of twenty years afterward, as owner, an adverse possession is shown. *Ibid.*

4. The possession of land under a deed given upon a sale for taxes, is adverse, though the title under the deed may be invalid.—*Hesrick et al.* v. *Doe d. Dunn et al.*, 164

5. Where land is held adversely, the party out of possession, although his right may be valid, is incapable of conveying to another. *Ibid.*

6. A judgment-debtor whose land was levied upon by an execution, procured a third person to bid off the land at the sheriff's sale, with a privilege to him to redeem, &c., and afterwards continued in possession. *Held*, that his possession was not adverse as to the purchaser.—*Neal et al.* v. *Pressell et al.*, 594

AFFIDAVIT.

See Chancery, 4.

AFFRAY.

See Indictment, 19.

AGREEMENT.

See Contract.

ALIMONY.

1. Alimony may be decreed to be paid in instalments.—*Houston* v. *Houston*, 139

2. It may also be made payable in a shorter period than that which is allowed by law for the stay of execution. *Ibid.*

3. There may be a stay of execution on a decree for alimony, as in other cases for the payment of money. *Ibid.*

AMENDMENT.

See Continuance, 5. Ne Exeat. Scire Facias, 7.

Where, in the absence of a party, the Court has improperly allowed the record to be amended by noting the filing of pleadings by his adversary, the proper remedy is by motion, in the same Court, to have the amendment set aside.—*Young et al.* v. *The State Bank*, 301

APPEAL.

See Costs, 1, 2. Injunction, 1. Ne Exeat. Occupying Claimant. Statutes, 1 to 3.

A justice of the peace, upon an appeal from his judgment to the Circuit Court, filed all the papers in the cause in the clerk's office, ten days before the first day of the term, except the cause of action, but omitted to file it till a few days afterward, and the cause was docketed for that term. The appellee moved that the cause should be stricken from the docket of that term and docketed for the ensuing term. *Held*, that the motion should have been sustained.—*Jamison* v. *Jarrett*, 187

APPEARANCE.

See Judgment, 4.

APPRAISEMENT.

See Sheriff's Sale, 1.

ARBITRATION.

See Costs, 2. Statutes, 9.

1. Objections to a person's sitting as an arbitrator ought to be made at the trial before the arbitrators.—*Cones* v. *Vanosdol*, 248

2. The R. S. 1843 require that the arbitrators shall be sworn, but do not require that the award shall contain evidence thereof. *Ibid.*

3. That fact may be shown *aliunde*. *Ibid.*

4. The defendant against whom an award was made under c. 44, R. S. 1843, appeared to a motion to have the award entered of record. The Court granted the motion, the defendant not excepting thereto, and also a rule requiring the defendant to show cause, &c. *Held*, that it must be presumed that a copy of the award had been duly served upon the defendant. *Ibid.*

5. The order of submission of a cause recited that all matters of difference in the cause now pending in, &c., on appeal, wherein *A.* is plaintiff and *B.* is defendant, are hereby referred to the arbitrament, &c. The award, after specifying the reference and the names of the arbitrators, was as follows: And they do, by these presents, award of and concerning the matters referred as follows, that is to say: the said arbitrators award and adjudge that the said *B.* shall forthwith pay or cause to be paid to the said *A.* the sum of 30 dollars, in full satisfaction and dis-

charge of and for all matters in difference referred as aforesaid. *Held*, that the award was abundantly certain, definite and comprehensive. *Ibid.*

6. Where the parties to an arbitration have, by their agreement, fixed upon the rule which is to govern the question of costs, the arbitrators are precluded from making any order on the subject; and an order made by them, under such circumstances, is void. *Ibid.*

7. Such an order will not, however, invalidate the residue of the award. *Ibid.*

8. A cause was taken by appeal from a justice's judgment to the Circuit Court, and while there was submitted to arbitration, upon an agreement that the costs were to be disposed of according to the rules prescribed by statute in cases appealed from justices' judgments. The judgment for the plaintiff, before the justice, was for 18 dollars, and in the Circuit Court, upon the award, for 30 dollars. *Held*, that the judgment carried full costs. *Ibid.*

9. An award made under c. 44, R. S. 1843, and signed and returned to the Circuit Court by the arbitrators named in the submission, is not vitiated or annulled by being also signed by a third person who had no authority to act. *Ibid.*

10. The agreement for the submission of a cause to arbitration provided that all matters of difference therein pending, &c., should be referred to the arbitrament and determination of *A.* and *B.*, with liberty to the arbitrators, either before they entered upon the arbitration or at any time pending the reference, to appoint an umpire; and that they, or a majority of them, should make their award in writing, and return the same. *Held*, that the person designated as an umpire, was intended to be merely an arbitrator. *Ibid.*

11. In a suit brought upon the common count for goods sold, the parties, during the pendency of the action, entered into a written agreement, which was made a rule of Court, by their consent, by which the cause was submitted to *A.*, *B.* and *C.*, for their *award*, or the *award* of any two of them, &c., and said *arbitrators*, after being duly sworn, should investigate and report to the Court, &c., the result of their investigation of all accounts in issue between the parties, &c. *Held*, that this was a "reference," under the R. S. 1843.—*Ross* v. *Helton*, 273

12. An objection that a report of referees was filed in vacation and not in open Court, must have been made before the Court below, or it will not be noticed on error. *Ibid.*

ARBITRATORS.

See ARBITRATION, 1 to 3, 6, 10.

ASSAULT AND BATTERY.

See PLEADING, 17. SCHOOLMASTER.

ASSESSMENT OF DAMAGES.

See PROMISSORY NOTE, 9.

ASSIGNMENT.

See MORTGAGE, 5 to 7, 9. PROMISSORY NOTE, 1 to 3, 6, 14, 17 to 25, 31. STATE PRINTER, 4, 5.

An assignment of a decree of foreclosure was as follows: For value received, I assign my interest in the above decree to *A. B.*, with the interest thereon. *January* 11, 1841. (Signed) *C. D. Held*, that, whatever might be the legal effect of the assignment, it was sufficient to empower *B.* to control the decree, collect it, and receipt for it.—*Fairman* v. *Farmer et al.*, 436

ASSUMPSIT.

Money obtained by fraud may be recovered back in assumpsit.—*Reynolds* v. *Rochester*, 43

ATTORNEY AT LAW.

See CONSTITUTIONAL LAW, 17. COURT.

1. An attorney was made a party to a motion to set aside an execution. Upon service of notice he appeared to the motion, without objection, and submitted to a judgment for costs, without excepting to the same. *Held*, on error, that the judgment must be presumed to be right.—*Loveland et al.* v. *Jones*, 184

2. It is competent for a Court, where an attorney has improperly caused an execution to be issued, to tax him with the costs of a motion to set it aside. *Ibid.*

3. If an attorney at law, to whom a claim has been sent for collection, employs another to collect it, without authority from the client, he will be liable for any damage to the client arising from the negligence or want of skill of such other attorney.—*Abbott et al.* v. *Smith*, 452

4. The damages arising from such negligence or unskillfulness are of an unliquidated character, and not, under the R. S. 1843, a subject of set-off. *Ibid.*

5. An attorney at law having filed a petition for a divorce which was unnecessarily gross and indelicate, and having deported himself improperly in reading it, the Court taxed him with the costs of the cause. *Held*, that the Court acted within its authority.—*Brown* v. *Brown*, 627

AUDITOR.

1. The constitution of 1851 imposes no duties upon county auditors, but leaves their duties to be defined by the legislature.—*Jones* v. *Cavins*, 305

2. The creation by the constitution of 1851 of the office of county auditor in each county, did not operate to revive the law prescribing the duties of the auditor of *Greene* county, which had previously been repealed. *Ibid.*

3. The constitution of 1851 did not extend the operation of the laws in force at its adoption prescribing the duties of county auditors, beyond the boundaries then limiting them. *Ibid.*

4. It simply declares that those laws shall be in force until they expire by their own limitation or are repealed by the legislature. *Ibid.*

5. The office of county auditor was first created by an act of the legislature of 1841, and the duties pertaining to it, in the counties where it was created, were previously, for the most part, performed by the clerk of the Circuit Court, an officer created by the old and continued by the new constitution. In 1844, an act was passed, abolishing the office of county auditor in *Greene* county, and restoring the duties then performed by the auditor in that county to the clerk. *Held*, that the clerk, by assuming the discharge of those duties, did not become the holder of two offices. *Ibid.*

6. The law of 1844 which restored to the clerk of *Greene* county the duties which had been transferred from his office to that of the county auditor, was continued in force by the constitution of 1851. *Ibid.*

AWARD.

See ARBITRATION, 2 to 5, 7 to 9, 12.

B.

BAIL.

See IMPRISONMENT FOR DEBT, 6, 7. REPLEVIN BAIL.

BAILMENT.

SEE DEPOSIT. USAGE. WHARFINGER.

BASTARDY.

1. The prosecuting witness on a complaint for bastardy, may be compelled to testify whether about the time she has alleged that the child was begotten, any person besides the defendant had carnal intercourse with her.—*Hill* v. *The State*, 112

2. If the complainant denies in her testimony that about that time she had carnal intercourse with another person than the defendant, a witness may be compelled to testify whether about that time she had carnal intercourse with him. *Ibid.*

3. It was not necessary, under the R. S. 1843, that the affidavit, upon a complaint for bastardy, should state the complainant's place of residence.—*The State* v. *Demoss*, 189

BILL OF DISCOVERY.

See CHANCERY, 18.

BILL OF EXCEPTIONS.

See EVIDENCE, 6.

1. A bill of exceptions, in noticing the evidence given at the trial, after stating the submission, &c., proceeded, "The plaintiff, to support the issue on his part, proved," &c., (setting out certain evidence). It then proceeded thus: "The defendant then read in evidence," &c., setting out certain other evidence. Immediately following were these words: "And the Court being sufficiently advised, take time," &c. *Held*, that the language did not show with sufficient certainty that the bill contained all the evidence given at the trial.—*Montgomery* v. *Doe d. Pearson*, 266

2. Where the bill of exceptions does not profess to contain all the evidence, the Supreme Court will presume that all the testimony necessary to sustain the verdict was adduced.—*The Rushville, &c., Railroad Co.* v. *McManus*, 275

3. Where the bill of exceptions does not profess to contain all the evidence, and a motion for a new trial does not appear

to have been made, the presumption is that there was other evidence, and that the action of the Court was correct.—*Ennis* v. *Vantrees*, 341

4. Where the bill of exceptions does not profess to contain all the evidence, it will be presumed that a state of facts existed to which the instructions complained of were applicable.—*Shaw* v. *The State*, 553

5. A bill of exceptions, which does not appear to have been signed by a judge, cannot be noticed.—*Eastes* v. *Daubenspeck*, 617

BOARD OF COMMISSIONERS.

1. In legal contemplation the Board of Commissioners of a county is the county.—*The State* v. *Clark et al.*, 315

2. At the *June* term, 1851, of the board of commissioners of *Switzerland* county, on the petition of twenty-four freeholders of *York* township in that county, it was ordered that one *C.* should have license to retail spirituous liquor in *Florence*, in said township, for one year, upon his paying 15 dollars into the county treasury, and giving bond, &c. *C.* accordingly paid the treasurer that sum and presented to the board the treasurer's receipt therefor, and also a bond in the penalty prescribed, with sufficient surety, conditioned according to the statute; and thereupon moved for the approval of the bond; but the board overruled the motion, on the ground that they had reconsidered and set aside the order granting license, and had ordered that said sum paid by *C.* to the treasurer should be refunded. *Held*, that the order of the board was inoperative, without an approval of the bond, and gave *C.* no authority to retail. *Held*, also, that the board had power to set aside the order granting the license, at any time before the approval of the bond.—*Crutz* v. *The State*, 385

3. The boards of commissioners were authorized by ss. 3 and 4 of the act to regulate taverns and groceries contained in the R. S. 1838, to grant licenses, to continue one year, to retail spirituous liquor.—*Rust* v. *The State*, 528

4. Those sections are continued in force by section 15 of chapter 59 of the R. S. 1843. *Ibid.*

5. There is no subsequent law in conflict with these sections. *Ibid.*

BOND.

See COVENANT, 7 to 12. DAMAGES, 1. INJUNCTION, 2. JUSTICE OF THE PEACE, 3, 4. PLEADING, 4. RELATOR. SHERIFF, 7.

1. In a suit upon a bond, a contemporaneous verbal agreement or understanding different from its stipulations, cannot be set up in bar.—*Clifford et al.* v. *Smith*, 377

2. *A.* having executed to *B.* a bond for the conveyance of land, upon which *C.* was a surety, *C.* afterward executed a bond to *A.* for the conveyance of certain other lands so soon as *A.* should have made the deed to *B.* in pursuance of his bond. *Held*, that *C.'s* agreement to convey to *A.* was gratuitous and void.—*Peelman* v. *Peelman et al.*, 612

BRIDGE.

See TERRE-HAUTE DRAWBRIDGE COMPANY.

BURDEN OF PROOF.

See LIEN, 1. PLEADING, 21. PROMISSORY NOTE, 7. SUPERVISOR, 3.

1. By a contract between *McGinley* and the state for building a bridge on the line of one of the public works, the engineer, in case *McGinley* should fail to comply with his contract, might declare it forfeited and null; the state might withhold 10 per cent. of the work performed; and might relet the job to another. The engineer made the declaration; and *McGinley* brought suit, alleging that the declaration was wrongly made. *Held*, that the proof of the allegation devolved upon him.—*The State* v. *McGinley*, 7

2. Action by the owners of a steamboat against the *Terre-Haute Drawbridge Company* to recover damages occasioned by the wrongful detention of the plaintiffs' boat by an obstruction created by the defendants' bridge. On error it was maintained that the plaintiffs should have been required to prove, in order to maintain their action, that the boat was licensed under the act of Congress of 1838. *Held*, that, supposing it was necessary that the boat should have been licensed, the license was to be presumed in the absence of evidence to the contrary.—*The Terre-Haute Drawbridge Co.* v. *Halliday et al.*, 36

3. Where payment is pleaded, the burden of proving the plea is upon the defendant.—*Clifford et al.* v. *Smith*, 377

4. Where the plaintiff grounds his right of action upon a negative allegation, the establishment of which is an essential ele-

ment in his case, he is bound to prove it, though negative in its terms.—*Nash et al.* v. *Hall et al.*, 444

BURGLARY.

See ACCOMPLICE.

C.

CANAL-LAND CERTIFICATE.

See CERTIFICATE FOR CANAL LAND.

CAPIAS AD SATISFACIENDUM.

See IMPRISONMENT FOR DEBT.

CASE.

See DAMAGES, 2. NEGLIGENCE.

CERTIFICATE FOR CANAL LAND.

1. A certificate for canal land which shows on its face that part of the purchase-money is unpaid, is not, under the R. S. 1843, evidence of legal title.—*Dickerson* v. *Nelson et al.*, 160

2. Where the certificate has been assigned, a levy upon and sale of the assignor's equitable interest, on a judgment rendered against him before the assignment, conveys no title to the purchaser. *Ibid.*

3. A bill will lie by the assignee of the original holder to enjoin a judgment-creditor of the latter, whose judgment was rendered before the assignment, from levying an execution issued on such judgment upon the land. *Ibid.*

CHANCERY.

See CERTIFICATE FOR CANAL LAND, 3. DOWER, 1. FRAUDULENT CONVEYANCE, 1 to 3. INJUNCTION. JUDGMENT, 1. LIEN. MORTGAGE, 5 to 10. NEW TRIAL, 4. PROMISSORY NOTE, 5, 14, 27. SPECIFIC PERFORMANCE, 1, 3. SUBSTITUTION. VENDOR AND PURCHASER, 10.

1. Where the allegations in a bill are general and indefinite, but sufficient to make it substantially good, and the decree is to be made on the bill without an answer, it is as much the duty of the chancellor to require proof reducing the matters alleged to certainty, as it is that of a court of law to award a writ of inquiry to assess the damages upon a general and indefinite declaration.—*Laney* v. *Laney et al.*, 149

2. The evidence in such a case must show that there is ground for the decree, or none can be rendered. *Ibid.*

3. Bill of foreclosure. The evidence did not sustain the bill, but it was shown that the plaintiff, on several occasions before and after the execution of the mortgage, had advanced money to the defendant, the mortgagor, and for his use. *Held*, that the refusal of the Circuit Court to retain the bill and give a decree for the money thus advanced, was right.—*Miley* v. *Marshall*, 211

4. Bill to enjoin the sale of land on execution, on the ground that the judgment-debtor, before the rendition of the judgment, had conveyed the land to the complainant, whose deed had never been recorded and had been casually lost. There was no affidavit of the loss of the deed. *Held*, that a decree for the complainant was, therefore, erroneous.—*Carlisle et al.* v. *Ramsey*, 242

5. *A.* being the owner of land mortgaged to the school fund, and being about to remove to another State, appointed *B.*, who lived near the land, his agent to lease it, &c., and to renew the mortgage at the expiration of the time it had to run. *B.* leased the land, &c., but did not renew the mortgage, an affidavit of the principal being necessary for that purpose. The land was sold for the non-payment of the mortgage, and *B.* became the purchaser and received a deed. More than nine months elapsed after *B.* knew he could not renew the mortgage, before said sale. *B.* afterwards sold to *C.*, an innocent purchaser, without notice of his agency, for a larger sum than the price paid by him, and left the state. *A.*, without having demanded of *B.* an account, filed his bill against *B.* and *C.*, praying that the land might be conveyed to him, and for general relief. *Held*, that it was the duty of *B.*, as soon as he ascertained that he could not renew the mortgage, to give *A.* notice; and that *B.'s* purchase must be regarded as a mere trust for the benefit of *A.*, who was entitled to the profits made by *B.* on the sale. *Held*, also, that *B.'s* non-residence excused a demand for an account before suit. *Held*, also, that *C.'s* title could not be disturbed.—*Beckett* v. *Bledsoe*, 256

6. The residence of *B.* in another and distant state, and his ignorance of the fraud practised by *A.*, was also *held* to excuse what would else have been an improper delay in bringing said suit. *Ibid.*

7. A creditor can acquire a lien by filing his bill in equity only where no lien has been gained or can be acquired at law.—*Hubbs et al.* v. *Bancroft et al.*, 388

8. A court of chancery will not interfere to correct a clerical mistake made by the clerk in entering a judgment of a court of law; nor to restrain proceedings for the enforcement of the judgment—except that perhaps, in a case of emergency, where an execution has issued in vacation and a levy and sale are threatened, a temporary injunction might be granted to restrain the proceedings until the next term, to give the party an opportunity to make his application to the Court that rendered the judgment to correct the alleged mistake.—*Cooper* v. *Butterfield*, 423

9. Where a debtor is living, and possesses an equitable interest in real estate, inasmuch as the creditor acquires at law, by the judgment, a lien on the real estate in which the debtor has a legal interest, equity, in aid of the law, carries along the lien and enforces it against real estate in which the debtor has only such equitable interest. And as by law the creditor acquires, by judgment and execution, a lien on the personal property to which the debtor has the legal title, equity enforces the lien on the equitable interest of the debtor in personal property. But it does this only where a judgment, which constitutes the lien at law, in one case, and a judgment and an execution, in the other, have been obtained.—*The Unknown Heirs of Whitney* v. *Kimball*, 546

10. Where, however, the original debtor is dead, a judgment at law need not, in this state, be obtained before going into chancery for the collection of the debt. *Ibid.*

11. In the latter case the jurisdiction rests on the ground that executors, administrators and heirs are, or may be, trustees for creditors, and, hence, are liable to be called to account in chancery. *Ibid.*

12. Where a remedy also exists at law, the two jurisdictions are concurrent. *Ibid.*

13. Chancery having, where the debtor is deceased, jurisdiction in the first instance and independent of all accidental circumstances, for the collection of the debt, the question whether the debtor had other property capable of being subjected at law to the payment of the debt, is immaterial. *Ibid.*

14. Where the bill is filed by one, or a few creditors, in behalf of all, they are all allowed to come in under the decree, prove their claims, and have them paid in the course of administration. *Ibid.*

15. A bill filed to subject to the payment of a judgment the equitable estate of a deceased debtor, which does not make his administrator a party, must allege that none had been appointed. *Ibid.*

16. To a bill against unknown heirs, the plaintiff was required by the R. S. 1843, to annex an affidavit of his want of knowledge of their names, and that their residence is, as he verily believes, not in this state. *Ibid.*

17. The R. S. 1852 require, in a like case, the same affidavit. *Ibid.*

18. A bill praying for discovery merely need not be sworn to; but when the complainant seeks, in addition to the discovery, to stay proceedings in a suit at law, he must support the allegations of the bill by an affidavit of their truth.—*Owsley et al.* v. *Barbour et al.*, 584

19. The plaintiff cannot recover in chancery on a ground not taken in his bill.—*Peelman* v. *Peelman et al.*, 612

20. The surety on a promissory note took a mortgage upon real estate from the principal, by way of indemnity. A judgment having been afterward obtained upon the note, and an execution having been returned *nulla bona*, the assignee of the judgment afterward obtained a decree for the sale of certain land, to satisfy the judgment, which the surety had conveyed to a third person, to defraud his creditors. The land was sold upon the decree, and the judgment satisfied out of the purchase-money. The principal having sold the mortgaged premises to a third party, after the mortgage was recorded, the surety filed his bill of foreclosure to recover the amount of the decree. The grantee was a party in the cause wherein the land fraudulently conveyed by the surety had been ordered to be sold. *Held*, that the bill would lie.—*The State Bank* v. *Davis*, 653

CIRCUIT COURT.

See JURISDICTION, 1. WITNESS, 11, 12.

The Circuit Court, so far as it is vested with discretionary powers, will be presumed to have exercised them properly, until the contrary is shown; and, though its decision will be subject to revision, yet it will be presumed to have been in accordance with the justice and merits of the case, unless the party complaining shows une-

quivocally that the Court has been guilty of an abuse of such discretionary powers, and that his rights have thereby been injuriously affected.—*Detro* v. *The State*, 200

CLAIM AGAINST AN ESTATE.

See PLEADING, 36.

CLERICAL MISTAKE.

See CHANCERY, 8.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 25, 26.

COMMON PLEAS, COURT OF.

Courts of Common Pleas have not jurisdiction, under the R. S. 1852, over offences committed before the act establishing said courts took effect.—*The State* v. *Nolan*, 508

COMPLAINT.

See NAME.

1. A complaint under the act of 1852 establishing courts of Common Pleas, for an assault and battery, did not set out the christian name of the defendant, but only the initials. *Held*, that the defendant could avail himself of the omission by motion to quash, as well as by plea in abatement.—*Gardner* v. *The State*, 632

2. In *January*, 1853, the R. S. of 1852 not being in force, informations for misdemeanors were not authorized by law, but only a sworn charge or complaint. *Ibid.*

CONDITION SUBSEQUENT.

See VENDOR AND PURCHASER, 10.

CONDITIONAL SALE.

See MORTGAGE, 2 to 4.

CONFESSION OF JUDGMENT.

See JUDGMENT, 4.

CONSIDERATION.

See PLEADING, 31, 35. PROMISSORY NOTE, 7, 11, 12, 15, 16, 33, 34. SEDUCTION.

CONSTITUTIONAL LAW.

See AUDITOR. LIMITATIONS, STATUTE OF, 4. NEW TRIAL, 2. REMEDY, 1. STATUTES 14, 15.

1. The Legislature has not the power to grant a new trial of a suit at law.—*Young et al.* v. *The State Bank*, 301

2. The words "published" and "circulated," in s. 28 of art. 4 of the constitution of 1851, are used synonymously.—*Jones* v. *Cavins*, 305

3. That part of s. 28 of art. 4 of the constitution of 1851, which declares that "no act shall take effect until the same shall have been published and circulated in the several counties," &c., means that such act shall not take effect in any county until it has been distributed to all. *Ibid.*

4. The judiciary look to the acts of the legislature with great respect, and reconcile them with the constitution, and sustain them, if possible.—*Maize* v. *The State*, 342

5. The presumption that an act of the legislature is in violation of the constitution is not to be indulged, unless it is clearly subversive of that instrument. *Ibid.*

6. Such a presumption cannot arise from the mere fact that an act is imperfect or impolitic. *Ibid.*

7. It is the right and duty of the courts to inquire into the constitutionality of the acts of the legislature, whenever such questions are judicially presented. *Ibid.*

8. A construction of the constitution by the legislature, where it is restrictive of legislative authority; or where the constitutional question has not been considered by that body; or where such legislative construction is not continuous and concurring, is not entitled to much weight; and as between two legislative constructions differing from each other, that more nearly contemporaneous with the constitution, would seem to be the better authority. *Ibid.*

9. Sections 22 and 23 of art. 4 of the constitution of 1851, were designed to remedy the evil of local and special legislation which had grown up under the old system. *Ibid.*

10. The law-making power being vested by the constitution of 1851 in the general assembly, the exercise, by any other body, of the power to make, sanction, suspend, or give effect to, the laws is necessarily excluded. *Ibid.*

11. The term "operation of the laws," as used in s. 26 of art. 1 of the constitution of 1851, seems to mean, their taking effect and continuing in force. *Ibid.*

12. So much of the act of *March*, 1853, "to regulate the retailing of spirituous liquor," &c., as relates to the popular vote, is in conflict with ss. 25 and 26 of art. 1, and, also, of ss. 22 and 23 of art. 4, of the constitution. *Ibid.*

13. Submitting laws to the vote of the people in their primary capacity, is subversive of the representative system and inconsistent with the constitution. *Ibid.*

14. It is, also, inconsistent with the constitutional provision requiring the yeas and nays on the final passage of a bill. *Ibid.*

15. As a license law, the act in question is complete without the part relating to the township vote; and a license may issue upon the filing of the requisite bond. *Ibid.*

16. Section 5 of article 7 of the constitution of 1851, which requires the Supreme Court, upon the decision of every case, to give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon, applies only to cases arising under that constitution.—*Hand et al.* v. *Taylor*, 409

17. So much of s. 15 upon p. 3 of vol. 2, R. S. 1852, as requires an attorney at law, in the case of a poor person, to prosecute or defend, upon his appointment by the Court, without fee, is in conflict with s. 21, art. 1, of the constitution of 1851, and void.—*Blythe* v. *The State*, 525

CONTEMPT.

See COURT.

CONTINUANCE.

1. A motion for a continuance, based upon an affidavit of the party, is addressed to the sound discretion of the Court trying the cause; and the propriety of granting or refusing it must depend, to a great extent, on the peculiar circumstances of each case. From the very nature of the case, the Court trying a cause—witnessing all the proceedings, and being, from personal observation, familiar with all the attendant circumstances—has the best opportunity of forming a correct opinion upon the case presented.—*Detro* v. *The State*, 200

2. The general principles relative to the granting of continuances are well and clearly defined, but, of necessity, there is a considerable latitude of discretion left to be exercised by the Court, and, if no general principle has been violated, the presumption will be in favor of the action of the Court. *Ibid.*

3. The defendant, indicted for larceny in the *Wells* Circuit Court, applied for a continuance upon his affidavit stating that he could prove by one *A.*, a resident of *Miami* county, *Ohio*, that at the time the property mentioned in the indictment was *alleged* to have been stolen, the defendant was in the town of *Greenville*, and in the neighborhood, in *Darke* county, *Ohio*, and further, that said *A.* could prove his entire innocence of the charge, &c. *Held*, that the affidavit was defective for confining the *alibi* to the day alleged in the indictment. *Held*, also, that the general allegation that the defendant could prove his innocence by the absent witness, was immaterial. *Held*, also, that the refusal of the continuance was not erroneous. *Ibid.*

4. After verdict against the defendant, he made a motion for a new trial, on the ground of the refusal of the Court to grant the continuance upon such affidavit. The Court overruled the motion. The evidence in the cause was not set out in the record. *Held*, that it must be presumed that the evidence did not disclose that the larceny was committed on the day *alleged* in the indictment, and that no cause for a new trial was made by the evidence. *Ibid.*

5. In a suit to recover the amounts of an engineer's estimates for work done for a railroad company, the declaration left the amounts blank, and the Court allowed the plaintiff to supply the blanks by inserting the amounts. The defendant having applied for a continuance, without showing that he was prejudiced by the amendment, *held*, that the continuance was properly refused.—*The Rushville, &c., Railroad Co.* v. *McManus*, 275

CONTRACT.

See BOND, 1. BURDEN OF PROOF, 1. DOWER, 2. MARRIAGE, 1 to 3. RESCISSION. SALE, 3, 4. STATE PRINTER, 6, 7. WHITE WATER VALLEY CANAL COMPANY, 1.

1. A contract between *McGinley* and the state for building a bridge on the line of one of the public works, after prescribing what things should be done and omitted by the engineer or his assistant, provided that the contractor was in all things to follow the directions of the engineer or his assistant. *Held*, that he was only authorized to follow the engineer or his assistant in those things wherein they had a right to direct him.—*The State* v. *McGinley*, 7

2. The parties to a written contract, not under seal, may, before breach, enter into a valid oral contract providing for its discharge by the delivery of property, or in any other manner.—*Ward* v. *Walton*, 75

3. Where an attorney at law engages to defend a cause for a specific sum, and dies before the cause is determined, his administrator may recover from the client, upon the *quantum meruit*, the amount which the intestate's services were really worth to him.—*Coe* v. *Smith*, Administrator, 79

4. The recovery cannot, however, exceed the contract price, or the rate of it for the part of the service performed. *Ibid.*

5. It is the province of the Court, and not of the jury, to determine the construction to be given to a written agreement.—*Beatty* v. *Gates*, 154

6. A term improperly employed in a written agreement will not control its construction where the meaning of the parties is palpable.—*Cones* v. *Vanosdol*, 248

7. If *A.* promises *B.* to do a particular thing for *B.*, in consideration of something to be done by *B.* upon the happening of a particular event, and such event may happen before the thing can be performed by *A.*, the undertakings of the parties are independent.—*Gillum* v. *Dennis*, 417

8. If *A.*, however, sues *B.* on his part of the contract, after the time fixed for the performance by *B.* of his part has elapsed, the case is in the same condition as if the undertakings had been dependent. *Ibid.*

9. A full and faithful compliance with a contract is required by the rule that an agreement must be performed according to its terms as understood and assented to by the parties. *Ibid.*

10. *A.* undertook, for a sufficient consideration, to keep four children of *B.*, for two years, and to board and clothe them. *Held*, that the parties must be presumed to have intended that the boarding and clothing, &c., were to be suitable to *A.*'s condition in life, and in accordance with the usages of the society in which he and his family moved. *Ibid.*

11. The release of a parol contract need not be under seal.—*Develin* v. *Riggsbee*, 464

12. *A.* agreed to deliver to *B.*, between the 20th of *December*, 1851, and the 1st of *January*, 1852, four thousand shoulders, &c., to be paid for at the time of delivery. The place of delivery was not designated. *Held*, in a suit by *A.* against *B.* for the non-performance of the agreement, that the property should have been delivered to *B.* where *A.* had it at the time of the sale, or at *A.*'s usual place of business, and that a request to deliver it was unnecessary. But, *held*, that the declaration should have contained an averment that the plaintiff, at the time and place of delivery, was ready to receive and pay for the goods.—*Bailey* v. *Ricketts et al.*, 488

13. The time fixed for the performance of a contract was "the latter part of *January*." *Held*, that the phrase must be construed to mean the whole of that part, and that a suit would not lie for the non-performance of the contract until the expiration of the month. *Held*, also, that the declaration of the defendants, before the end of the month, that they would not then, nor ever, deliver the goods, did not excuse the plaintiff from deferring suit until the end of the month. *Ibid.*

14. The plaintiffs sued the defendant upon a special agreement, and also upon a *quantum meruit*, for services rendered by them as attorneys at law. The evidence showed that the plaintiffs had agreed with the defendant to commence and prosecute a suit for her to set aside a deed executed by her to one *A.*, and that if the deed should be set aside she was to pay them for their services 150 dollars, but if it should not be set aside, she was not bound to pay them anything. The plaintiffs had accordingly commenced and prosecuted the suit, and the Court upon the final hearing set aside the deed as to part of the property conveyed by it, but confirmed it as to the residue. *Held*, that the plaintiffs could not recover anything on a count upon the special agreement; but that, upon the *quantum meruit*, they were entitled to recover an amount equal to the benefit received by the defendant from their services, not exceeding the sum agreed upon for an entire performance of the contract.—*Major et al.* v. *McLester*, 591

CONVENTION, CONSTITUTIONAL.

See STATE PRINTER, 6, 9, 10.

CONVEYANCE.

See ADVERSE POSSESSION, 5. COVENANT. RELEASE, 2. SEDUCTION. TAXES, 6. VENDOR AND PURCHASER, 7.

1. The Bank of *Vincennes* conveyed a tract of land to certain persons in trust to sell, under the direction and for the benefit of

the *United States*, and to convey the same in fee simple to the purchaser and his heirs; but the deed did not, in terms, convey the land to the trustees and their "heirs." *Held*, notwithstanding, that the deed passed the fee to the trustees.—*Neilson et al.* v. *Lagow*, 607

2. A release of real estate is not valid unless a grantee is in some way designated.—*Nosseman et al.* v. *Nosseman*, 648

CORPORATION.

1. In 1850 the legislature enacted a law, the first section of which declared that all such persons as should become stockholders to the capital stock thereinafter mentioned, their successors, &c., should be and were thereby constituted a body corporate by the name of the *American Live Stock Insurance Company*. The second section enacted that one *A.* and seven others named, or a majority of them, should be commissioners to receive subscriptions of stock, and that, when two hundred shares should be subscribed, they should call a meeting of the stockholders "by an advertisement published in such place or places as the commissioners might determine, stating the time and place at which such meeting of the stockholders shall by ballot elect the first directors of said company." It was further enacted that the stock should be in shares of 50 dollars each, and that, at the time of subscribing, there should be paid an instalment of 1 dollar on each share subscribed, and that the remainder should be paid at such time and on such terms as should be determined by the president and directors of the company. Under this law, articles of association were prepared, the subscribers to which severally undertook to pay 5 per cent., in cash, at the time of subscribing, and to secure the balance by executing a promissory note, to be approved by the directors, payable on demand. *B.* became a subscriber of ten shares, and executed his note for the amount of his subscription, less 5 per cent., payable on demand "in such sums and at such times as might be duly assessed thereon by order of the directors to meet the exigencies of said company." In a suit against *B.* upon his subscription and note,

Held, that the question whether the exigencies of the company required the payment of the instalments, could not be raised in a suit at law to recover them.

Held, also, that the fact that the commissioners may not have met to receive subscriptions, nor called a meeting of the stockholders to elect directors, did not annul or vitiate the existence of the corporation.

Held, also, that the provision in said section 2 for the raising of the stock and bringing about the first election of directors, was directory, and merely for convenience, and not essential to the validity of the corporate organization.

Held, also, that a plea setting up that 1 dollar on a share was not paid at the time of subscribing, was no defence to the action.

Held, also, that the facts that one *C.*, who received the subscription, represented that he was authorized to receive the subscriptions, when he was not, and that the directors had not ordered it to be taken, were no defence to the action.

Held, also, that the first section of the company's charter created the corporation out of the stockholders; and, so soon at least as the stock was subscribed, the corporation was complete, without the election of directors, and without a formal organization.—*Judah* v. *The American Live Stock Insurance Co.*, 333

2. *Semble*, that a person who has contracted with an organization as a corporation, is estopped from denying its legal corporate existence, at the date of his contract, where there is no fraud. *Ibid.*

3. On questions as to the power of corporations to deal in their corporate capacity with third persons, they will be limited by the terms of their respective charters; but, on questions relating to the mere manner of getting them into operation, a liberal construction of their charters will be adopted. *Ibid.*

4. School districts, being public corporations, organized under a public statute, the Courts will judicially take notice of their organization.—*Swails* v. *The State*, 516

COSTS.

See ATTORNEY AT LAW, 1, 2, 5. ARBITRATION, 6 to 8. USURY, 6.

1. Upon an appeal from the judgment of a justice of the peace, the defendant, if he reduces the justice's judgment more than 5 dollars, is entitled, under the R. S. 1843, to a judgment for costs.—*Hunt* v. *Lewis*, 174

2. The statute creating the *Centreville* and *Abington* Turnpike Company, authorized an appeal from the decision of the arbitrators selected by the parties to the Circuit Court, according to the same rules that prevail in cases taken from a justice's judgment. The company having ap-

pealed from the decision of the arbitrators to the Circuit Court, and reduced the amount awarded over 5 dollars, *held*, that the company were entitled to recover costs.—*The Centreville, &c., Turnpike Co.* v. *Jarrett et al.*, 213

3. In actions *ex delicto*, under the R. S. 1843, where the title to real estate comes in question, the plaintiff, when successful, is entitled to recover full costs, though he does not recover 5 dollars in damages.—*Burnett* v. *Coffin*, 218

4. Action to recover damages for the overflow of the plaintiff's land by a mill-dam erected by the defendant. Plea, not guilty. Verdict for the plaintiff for 1 cent, and judgment accordingly, and for costs. The R. S. 1843 were then in force. The evidence was not upon the record. *Held*, that it must be presumed that the title to real estate came in question, and that the judgment for costs, was, therefore, right. *Ibid.*

5. In an action of tort, where the damages laid are over 50 dollars, but the recovery is for a less sum, the plaintiff is, under the R. S. 1843, entitled to costs.—*Hull* v. *Kirkpatrick*, 637

6. *A*, having been indicted in twelve cases for retailing spirituous liquor, the indictments were all, by consent, submitted, at the same time, for trial, to a jury. The testimony of a witness was heard, the jury found the defendant guilty upon nine of the indictments, and assessed a separate fine in each case, and judgments were rendered accordingly. *Held*, that a separate jury fee, docket fee, and witness fee were taxable on each of the judgments against the defendant.—*Kruiz* v. *The State*, 647

COUNTY.

See BOARD OF COMMISSIONERS.

COUNTY AUDITOR.

See AUDITOR.

COUNTY TREASURER.

See TREASURER.

COURT.

A Court has the power to protect itself against gross violations of decency and decorum, and an appellate Court can only interfere where the power is shown to have been abused.—*Brown* v. *Brown*, 627

COURT OF COMMON PLEAS.

See COMMON PLEAS, COURT OF.

COVENANT.

See CONTRACT, 7, 8.

1. To constitute a breach of the covenants of warranty and seizin in a deed of land, there must have been an entire want of title in the grantor when the deed was executed, or a subsequent eviction by paramount title.—*Hooker et al.* v. *Folsom, Administrator*, 90

2. In a declaration for the breach of the covenant of warranty in a conveyance of land, an eviction must be alleged.—*Hannah* v. *Henderson*, 174

3. The existence of paramount title in a stranger when the conveyance was made, does not, of itself, show an eviction. *Ibid.*

4. The fact that land is subject to the lien of an outstanding judgment at the time of its conveyance, does not, of itself, authorize an action for the breach of the covenant of warranty. *Ibid.*

5. Neither does the fact that an execution has been awarded upon the judgment against the land. *Ibid.*

6. The yielding to the paramount title of a stranger, by giving up possession or buying in such title and continuing possession under it, is evidence of an eviction. *Ibid.*

7. Debt on a penal bond. The conditions were that the obligee had leased to the obligors a steamboat for a specified term, with her tackle, &c., for a sum named—the obligors to have the control of the boat during the term, and to return her, with her fixtures, at *E.*, in as good condition, &c., reasonable wear excepted. The lessees were to pay the expenses of the boat during the term. If the boat should be stopped for debts previously contracted, the lessees were to be discharged as to rent, &c., but if destroyed while in the lessees' possession, then, besides paying the rent, they should also pay a sum specified for the boat. On the performance of these conditions, the bond was to be void. The obligee warranted the boat to be sound, seaworthy, and to contain the necessary apparel, &c. *Held*, that the covenants in the condition of the bond were not dependent.—*Clifford et al.* v. *Smith*, 377

8. The first breach assigned was, that the obligors did not return the boat in as good condition, &c., whereby the obligee was obliged to expend 2,000 dollars in repairing her, &c. A plea to this breach set up, that though the boat was not in some respects in as good condition when returned as she was, &c., yet in others she was in a better condition, &c. *Held*, that the plea was bad either on special or general demurrer. *Ibid.*

9. Another plea to the same breach averred that the obligor was not compelled to expend 2,000 dollars, &c. *Held*, that the plea was no answer to the substantial part of the breach. *Ibid.*

10. *Held*, also, that the defendants could not set up by plea that the boat when received by them was not in good repair, &c. *Ibid.*

11. *Held*, also, that they would not be excusable for taking the boat into dangerous waters, for the navigation of which she was not properly equipped. *Ibid.*

12. *Held*, also, that after having used the boat a month and snagged her, it was too late to set up that she was not properly fitted, &c., for navigation, and was of no value. *Ibid.*

CRIMINAL LAW.

See Costs, 6. Former Conviction. Indictment. Justice of the Peace, 2. Name. Retailing. Statutes, 8, 19.

1. A defendant indicted for a crime, cannot exempt himself from punishment by showing that it was the custom of the country to do the act which constituted the crime.—*Bankus et al.* v. *The State*, 114

2. The verdict of a jury against a person indicted for burglary, does not render him infamous, and, therefore, incompetent as a witness; but it is the judgment of the Court which does so.—*Dawley* v. *The State*, 128

3. A jury may convict a person of burglary upon the testimony solely of an accomplice. *Ibid.*

4. The fact that the prosecuting attorney has refused to enter a *nolle prosequi* against a person indicted for burglary who has given testimony which led to the conviction of an accomplice under a promise of favor upon the disclosure of the whole truth, cannot affect the judgment against such convicted accomplice. *Ibid.*

5. Where a defendant has been convicted of larceny on information filed under the R. S. 1852, without any affidavit or other sworn charge, the judgment, on motion, will be arrested.—*Baramore* v. *The State*, 524

6. A person cannot be punished for the doing of an act, which, at the time of its commission, was not prohibited by law.—*Rust* v. *The State*, 558

7. A charge, in an information for gaming, that *A.* lost, &c., upon a game at cards, is not supported by evidence establishing that *A.* and another jointly lost, &c.—*Jackson* v. *The State*, 560

8. Crimes and misdemeanors, in this state, must be defined, and the punishment therefor fixed, by statute, and not otherwise.—*Rosenbaum* v. *The State*, 599

CROSS ACTION.

See Remedy, 3.

CUSTOM.

See Criminal Law, 1. Usage.

D.

DAMAGES.

See Contract, 3, 4, 14. Replevin, 2, 3. Statutes, 9.

1. *A.* sold to *B.*, by deed of warranty, a tract of land incumbered by a mortgage executed by *A.*, and gave to *B.* a penal bond to secure the payment of the mortgage by a given day. *A.* failed to pay it; but *B.* had not paid it nor suffered any inconvenience from the non-payment. *Held*, in a suit by *B.* against *A.* upon the bond, that the damages recovered should have been only nominal.—*Schooley et al.* v. *Stoops et al.*, 130

2. The plaintiff below came to the depot of the defendants' railroad at *S.*, with his wagon, to haul to the town of *R.* a load of dry-goods, and was directed by the defendants' agent who had charge of the depot, where to back his wagon and receive the load. While he was engaged in loading the wagon, at the place designated, through the defendants' negligence it was run into by the defendants' cars, and seriously damaged, so as to be unable to convey its load. In an action on the case the Court, upon these facts appearing, instructed the jury that the measure of damages was the damage done to the wagon, the loss of the trip in which the plaintiff was engaged, and the loss of the use of the wagon until, by proper diligence, the plaintiff could get it repaired. *Held*, that the instruction

was correct.—*The Shelbyville, &c., Railroad Co.* v. *Lewark*, 471

DEBT.

See GAMING, 1. IMPRISONMENT FOR DEBT.

DECREE.

See ASSIGNMENT, 1. MORTGAGE, 10.

DELIVERY.

See CONTRACT, 12. PROMISSORY NOTE, 4.

DEMAND.

See CHANCERY, 5. LANDLORD AND TENANT, 1. PROMISSORY NOTE, 4.

DEPOSIT.

See WHITE WATER VALLEY CANAL COMPANY.

1. There is a distinction in deposits of this kind: Where the very silver or gold deposited is to be restored, the transaction is a special or pure deposit; but where the party is to restore, not the identical coin, but only an equivalent, on demand, it is called a loan or *mutuum* or irregular deposit.—*The State* v. *Clark et al.*, 315

2. *Semble*, that the surplus revenue fund held by the state, is a deposit of the latter class. *Ibid.*

DEPOSITION.

It is not error to refuse a motion to suppress a deposition, where no objection to the deposition is pointed out.—*Hunt et al.* v. *Bailey*, 630

DEPUTY MARSHAL.

See ESTOPPEL, 2. PLEADING, 21, 22.

DESCENT.

1. A person inherited lands in this state from her maternal grandfather and died while the R. S. of 1831 were in force, intestate, and unmarried, leaving a father surviving her, but neither children nor their descendants, nor brothers or sisters, but brothers and sisters of her mother. *Held*, that the father inherited the land.—*Case et ux.* v. *Wildridge et al.*, 51

2. In doubtful cases the law of inheritance prevails against the terms of the will.—*Stevenson et ux.* v. *Druley*, 519

DISCONTINUANCE.

See PRACTICE, 18, 19. SCIRE FACIAS, 6.

DISCRETIONARY POWERS.

See CIRCUIT COURT. WITNESS, 11, 12.

DISGRACE.

See WITNESS, 2.

DIVORCE.

See ALIMONY.

DOWER.

1. *A.* conveyed to *B.*, in 1833, a tract of land, and his wife, who was then only seventeen years of age, joined in the conveyance and acknowledged the same. In 1837, when she attained to her majority, *A.* died. She continued afterward to reside in the immediate vicinity until 1847, when she married *C.*, and lived with him near the land, until 1850, when a demand for an assignment of her dower was made, and, not being complied with, a bill was filed by her and her husband to have her dower assigned. When the conveyance was made by *A.*, the land was almost wholly unimproved; but *B.*, after his purchase, had been constantly and greatly improving it. *Held*, that, under the circumstances, the bill would not lie.—*Herman* v. *Kendall et ux.*, 463

2. The vendee of land, who had not paid all the purchase-money nor received a deed, died in 1829, leaving a widow surviving him. *Held*, that the widow had only an equitable right, under the statute, to be endowed of the interest *during* her life of one-third of the amount the land would sell for over the unpaid purchase-money, interest, and costs. *Held*, also, that her claim might be compromised and discharged by a parol agreement with the vendor or his assignee.—*Malin* v. *Coal*, 535

E.

EJECTMENT.

See ADMINISTRATOR'S SALE, 1, 2. OCCUPYING CLAIMANT.

1. To defeat the recovery of a plaintiff in ejectment who produces a regular *title*, by a title founded in possession, strict proof must be made not only that the possession was from its inception under a *public* claim of title adverse to that of the real owner, but that both such claim and possession have been continuous and uninterrupted for a period of twenty years before the commencement of the suit.—*Doe d. Harlan et al.* v. *Brown*, 143

2. Where several tenants have, during such period, successively occupied the premises, to make their possession available against the real owner, it must be shown that each one claimed to hold and was in possession under his predecessor. *Ibid.*

EQUITY.

See CHANCERY.

ERROR.

See ADMINISTRATOR'S SALE, 1, 2, 5. ARBITRATION, 12. BILL OF EXCEPTIONS. CHANCERY, 3, 4. CONTINUANCE. DEPOSITION. EVIDENCE, 17, 19. EXECUTORS AND ADMINISTRATORS, 2, 3. INFORMATION, 9. INJUNCTION, 1. INSTRUCTIONS. JUDGMENT, 9, 14, 15. JURY, 2 to 4. NE EXEAT. NEW TRIAL. PLEADING, 7, 9, 15, 16, 19, 20, 33. PRACTICE, 1 to 3, 6 to 8, 13 to 17, 23, 31. PROMISSORY NOTE, 10. SCIRE FACIAS, 7. STAY OF EXECUTION. SUPREME COURT, 1, 4. VENUE. VERDICT. WITNESS, 11, 12. WRIT OF ERROR.

ESTOPPEL.

1. As a general proposition, a party who has expressly, or by his acts, waived his title to property, will be estopped from asserting it against a party who has invested money on the faith of such waiver. —*Laney* v. *Laney et al.*, 149

2. In an action upon the bond of a deputy marshal and his sureties for the taking by the deputy of insufficient bail on an execution, the defendants, if notified of a suit against the marshal and his sureties for the taking of such bail, and authorized to plead and offer such evidence in defence of the action as they may desire, are concluded by the amount of damages recovered in the latter suit.—*Hand et al.* v. *Taylor*, 409

EVICTION.

See COVENANT, 2 to 6.

EVIDENCE.

See BILL OF EXCEPTIONS. BURDEN OF PROOF. CERTIFICATE FOR CANAL LAND, 1. CHANCERY, 1, 2. CRIMINAL LAW, 1. FORMER CONVICTION. FRAUD, 2. LANDLORD AND TENANT, 1. PLEADING, 25. PRACTICE, 7, 8, 25. USURY, 6. VERDICT, 1, 3 to 5. WILL, 1, 2. WITNESS, 10.

1. The defendant, indicted for suffering his *mare* to be run in a horse-race, offered to adduce in evidence at the trial, a justice's docket, showing that he had been complained of before the justice and fined by him for suffering his *horse* to be run in a horse-race, and to prove, by parol, that it was a *mare*, and not a *horse*, for the suffering of which to be run, he had been fined by the justice. *Held*, that the Court properly refused to admit the evidence.—*Conway* v. *The State*. 94

2. The plaintiff having by replication to the plea of the defendant, alleged that the defence set up in the plea, had been pleaded by the defendant in a former suit between them, and that the matter of the plea was determined in the former suit, and having proved the filing of such plea in the former suit, that it had been lost or mislaid, and could not, after diligent search, be found, offered to give parol evidence of its contents. *Held*, that such evidence was admissible.—*Schwartz* v. *Osthimer*, 109

3. The existence and terms of a judgment must be established by the production of the record.—*Beatty* v. *Gates*, 154

4. When evidence is pertinent to the issue, it should be admitted, however little it may seemingly tend to prove.—*Harbor* v. *Morgan*, 158

5. Replevin by *A.* against *B.* for a horse. On the trial, *B.* having proved that the horse came into his possession by a purchase from one *C.*, offered to prove a conversation between *C.* and himself soon after the trade occurred, in relation thereto. It was not shown that *C.* was the agent of *A.* when the sale to *B.* was made. *Held*, that the Court correctly refused to admit the evidence.—*Travis* v. *Barkhurst*, 171

6. Where there are issues under which evidence to sustain the finding of the Circuit Court would have been admissible, it will be presumed, in the absence of a bill of exceptions embodying the testimony, that the Court had before it the evidence necessary to sustain its finding and judgment.—*Polleys et al.* v. *Swope*, 217

7. Indictment for receiving and concealing stolen goods. Upon the trial the state introduced one *A.* as a witness, who testified that one *B.*, *C.*, and himself stole the goods, and that the defendant, knowing them to be stolen, received them into his possession and assisted in concealing them. The defendant, thereupon, proved by other witnesses, that *A.* had stated out of Court that he had made the charge against the defendant with the hope of a pardon, and that the defendant had nothing to do with the matter. The state, then, to sustain *A.*'s evidence, offered a witness to prove that *A.* had testified before the grand jury that found the indictment, to the same that he had sworn at the trial; and the Court, notwithstanding the defendant's objection, admitted the

evidence. *Held*, that the evidence was properly admitted.—*Perkins* v. *The State*, 222

8. Where several facts must be proved to maintain the issue, the Court must admit any legitimate evidence, whenever offered, tending to establish either fact.—*The Rushville, &c., Railroad Company*, v. *Mcmanus*, 275

9. If the party adducing such evidence does not also adduce evidence tending to establish the other facts, the Court should, when requested, instruct the jury to disregard the evidence as to that fact. *Ibid.*

10. If evidence offered constitutes a link in the chain of evidence which is admissible, it should be admitted.—*The State* v. *O'Conner*, 299

11. When it becomes material to ascertain with what motive an act was done, the declarations made by the party himself while doing the act, and explanatory of it, are admitted as being part of the transaction, and as serving to explain its real character.—*Strange et al.* v. *Donohue*, 327

12. Action by husband and wife for an assault and battery upon the wife. Pleas—1. Not guilty; 2. *Son assault demesne*. Replication, *de injuria*. After the plaintiffs had given evidence tending to prove that the defendant had seized the wife and thrown her down while she was attempting to prevent him from beating her husband, they asked the witness whether the husband was a weak man and afflicted with disease. *Held*, that the evidence was admissible to show the manner and circumstances of the assault. *Held*, also, that an excess of force might be shown under the replication.—*Philbrick* v. *Foster et ux.*, 442

13. Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms.—*Nash et al.* v. *Hall et al.*, 444

14. Assumpsit against the maker of a note. Plea, the general issue. The declaration described the note as made by *Ephraim S. Muirhead*, and the plaintiff offered in evidence a note signed *E. S. Muirhead*. *Held*, that the note was admissible as conducing to prove the issue on the part of the plaintiff.—*Muirhead* v. *Snyder*, 486

15. Proof that a person is acting notoriously as a public officer, and is generally recognized as such, is *prima facie* evidence of his official character.—*Swails* v. *The State*, 516

16. School districts being public corporations, organized under a public statute, the courts will judicially take notice of their organization. *Ibid.*

17. The admissibility of evidence need not be examined, where, without regard to it, the other evidence fully sustains the judgment.—*Bush* v. *Seaton et al.*, 522

18. Debt against a clerk of the Circuit Court and his sureties on his bond, for his failure to account for the amount of a judgment in favor of *A.*, received by him. The defendants proved payments made by the clerk, as follows: 1. That on *October* 4, 1842, the clerk deposited 100 dollars in bank to *A.'s* credit; 2. A receipt of *A.*, indorsed on the record of the judgment, for 175 dollars, without date. *Held*, that it was a question for the jury, whether the sum deposited in bank was included in the receipt.—*The State* v. *Cheek et al.*, 543

19. Where the record does not profess to set out all the evidence, its insufficiency to support the judgment cannot be assigned for error.—*Dunlap* v. *Jones*, 641

EXECUTION.

See ALIMONY, 2, 3. JUDGMENT, 3. LEVY, 1. RETURN, 1. SHERIFF'S SALE, 2, 5, 6. STAY OF EXECUTION. VENDOR AND PURCHASER, 4.

1. Where the land of an execution-defendant has, during his lifetime, been levied upon by a *fi. fa.*, a *venditioni exponas* may issue after his death, and the land may be sold thereon.—*Doe d. Murphy et al.* v. *Hayes et al.*, 117

2. A *fi. fa.* was issued in *May*, 1848, levied on a wagon, and returned in *June* of that year, with an indorsement that the wagon was not sold for want of a buyer. Its return-day, by the R. S. 1843, was in *May*, 1849. In *March*, 1849, another *fi. fa.*, instead of a *vendi.*, was issued on the same judgment, levied on said wagon, and returned on the 13th of that month, with a like indorsement. *Held*, that, under the R. S. 1843, the lien of the first *fi. fa.* continued until *May*, 1850, and the wagon remained liable to be sold on a *vendi.* issued before that time. *Held*, also, that the issuing of the second *fi. fa.* was irregular, and did not affect the right to issue a *vendi.* subsequently on the first.—*Wolfe, Administrator*, v. *Wolfe*, 255

3. Section 381 of c. 40, R. S. 1843, which provides that "upon execution, the officer may levy upon any current gold or silver coin or current bank notes belonging to the judgment-debtor," does not

authorize him to levy an execution issued on a judgment against the debtor upon gold or silver coin or bank notes in his hands, collected on an execution in favor of the debtor.—*Winton et al.* v. *The State*, 321

4. The coin and notes, while in the hands of the sheriff, are in the custody of the law, and do not belong to the debtor. *Ibid.*

5. They are not subject to levy until they have come into the debtor's possession. *Ibid.*

6. Lands conveyed to a trustee to be sold and the proceeds accounted for, were, under the R. S. 1843, liable to levy and sale upon execution on a judgment against the *cestui que trust.*—*The State Bank et al.* v. *Macy et al.*, 362

7. If a sheriff, having levied upon personal property, leaves it in the hands of the execution-defendant for safe keeping, and the latter loses it, or converts it to his own use, such loss or conversion is a sufficient disposition of the levy to authorize the issuing of another execution.—*Cooley* v. *Harper*, 454

8. Money collected by a sheriff upon an execution in favor of *A.*, and paid over by the sheriff to the clerk of the Circuit Court from which the execution issued, is not subject to levy, while in the hands of the clerk, upon an execution issued against *A.*—*Sibert* v. *Humphries*, 481

9. The identical money paid by the sheriff to the clerk in satisfaction of an execution, does not, by such payment, vest in the execution-plaintiff as his property. *Ibid.*

10. Bank notes received by a justice of the peace in payment of a judgment, are not, while in his possession, subject to levy upon an execution against the judgment-plaintiff.—*Hooks* v. *York et al.*, 636

EXECUTORS AND ADMINISTRATORS.

See Administrator's Sale. Judgment, 11 to 13. Pleading, 28 to 31, 36. Promissory Note, 13.

1. An administrator is not authorized by the R. S. 1843, to take possession of the real estate of the intestate, if the heirs are present.—*Comparet et al.* v. *Randall*, 55

2. An order of the Probate Court for the leasing of real estate of an intestate upon the petition of the administrator, is erroneous, if the heirs of the intestate, being infants, did not appear to the action, and no guardian *ad litem* was appointed to answer for them. *Ibid.*

3. To authorize a judgment by default in the Probate Court against an administrator, under the R. S. 1843, he must have been served with process at least twenty days before the first day of the term.—*Carter* v. *Spencer*, 78

F.

FICTITIOUS SUIT.

See Supreme Court, 1.

FORCIBLE ENTRY AND DETAINER.

To sustain an action for forcible entry and detainer, it is not necessary to show a legal title to the property, a peaceable possession when the wrong was committed being sufficient.—*Swails* v. *The State*, 516

FORECLOSURE.

See Chancery, 3, 5.

FORFEITURE.

See Vendor and Purchaser, 10.

FORMER CONVICTION.

See Retailing, 2.

A defendant on trial for a misdemeanor may show in his defence that he has been tried and convicted for the same offence.—*The State* v. *O'Conner*, 299

FRAUD.

See Estoppel, 1. Fraudulent Conveyance. Promissory Note, 5. Vendor and Purchaser, 8, 9.

1. Money obtained by fraud may be recovered back in assumpsit.—*Reynolds* v. *Rochester*, 43

2. In an action to recover back money obtained by fraud, proof that the defendant obtained a part of the money for the use of a third and innocent person, is no defence against the recovery of that part. *Ibid.*

FRAUDS, STATUTE OF

See Statute of Frauds.

FRAUDULENT CONVEYANCE.

See SPECIFIC PERFORMANCE.

1. A voluntary conveyance of lands made by father to son, to prevent their being subjected to the payment of his debts—whether he is indebted as principal or surety—may be set aside by his creditors, and the land may be subjected to the payment of their debts.—*Law et al.* v. *Smith et al.*, 56

2. But the creditors will not be allowed to set aside the conveyance, until they have exhausted the other property of the grantor. *Ibid.*

3. *A.* held land by title-bond and had paid the purchase-money, and being sued at law for a debt, in order to prevent the land from being sold for the payment of the judgment, caused it to be conveyed, without consideration, during the pendency of the suit, to *B.*, his son, who, before judgment, conveyed it to *C.* Judgment was afterward rendered against *A.* for the debt. *B.* and *C.* both received the conveyance with a knowledge of the suit, and to prevent a sale of the land to satisfy the judgment; and *A.* still remained in possession of the land. *Held*, that the land was liable in equity for the payment of the judgment.—*Corwin* v. *Reddington et al.*, 198

4. Whether a deed made upon a valuable consideration is fraudulent or not, is, under the R. S. 1843, a question of fact and not of law.—*Hubbs* v. *Bancroft et al.*, 388

5. A debtor in embarrassed circumstances and capable of contracting, may sell his property, for the purpose of discharging his debts, for such consideration as he may choose, and if there be nothing illegal in the transaction, it will stand as against his creditors. *Ibid.*

G.

GAMING.

See INDICTMENT, 2, 3.

1. A person who has lost money, or a valuable thing, by betting upon a horse-race, may recover back the money, or the value of such thing, under the R. S. 1843, by an action of debt, if prosecuted within six months after the loss.—*Little* v. *Brannenburgh*, 35

2. A charge in an information for gaming, that *A.* lost, &c., upon a game at cards, is not supported by evidence establishing that *A.* and another jointly lost, &c.—*Jackson* v. *The State*, 560

GRANT.

See VENDOR AND PURCHASER, 6.

GROWING CROPS.

See SALE, 1.

H.

HIGHWAY.

See SUPERVISOR.

HORSE-RACE.

See EVIDENCE, 1. GAMING, 1.

HUSBAND AND WIFE.

See MARRIAGE. VENDOR AND PURCHASER, 5.

IMPRISONMENT FOR DEBT.

1. Imprisonment for debt is abolished in this state, except in cases of fraud.—*Wendover et al.* v. *Tucker*, 381

2. Under the R. S. 1843, a *ca. sa.* only issued where it appeared affirmatively by the finding of the Court or jury that the debtor had money or property which he fraudulently concealed or refused to give up. *Ibid.*

3. The policy of the law allowing the imprisonment of debtors being, in this state, to prevent fraud, it should receive a strict construction as to the debtor and a liberal one as to the creditor. *Ibid.*

4. The R. S. 1843 provide for that rule of construction. *Ibid.*

5. There are but two cases, under the R. S. 1843, in which a magistrate can discharge an insolvent: 1. Where a person taken on a *ca. sa.* is *in the hands* of the officer making the arrest; 2. Where the person is actually imprisoned in jail on such arrest. *Ibid.*

6. After a debtor has given a bond for the prison limits, he is no longer in the hands of the officer, and the latter has no control over him. *Ibid.*

7. A discharge by a magistrate of a person who has given bond for the prison limits, is, under the R. S. 1843, unauthorized and void. *Ibid.*

8. The actual imprisonment in jail spoken of in the R. S. 1843, means confinement in the jail of the county, properly so called, as distinguished from the "prison limits." *Ibid.*

I.

INADEQUACY OF PRICE.

See MORTGAGE, 4. SHERIFF'S SALE, 3, 4.

The opinion of the legislature, repeatedly expressed through the appraisement laws, is not without its uses to our own Courts, in aiding them to come to correct conclusions as to what shall be deemed adequacy or inadequacy of price.—*Benton* v. *Shreeve et al.*, 66

INDICTMENT.

See COMPLAINT. COSTS, 6. INFORMATION. SHERIFF, 8.

1. An indictment against a licensed grocer, founded on sec. 95, ch. 53, R. S. 1843, for vending spirituous liquor to a minor, alleged that the liquor was sold to the minor "without the consent of his parent," omitting the words "or guardian." *Held*, that a motion to quash for this omission was improperly sustained.—*The State* v. *Shoemaker*, 100

2. A count in an indictment founded on s. 100, c. 53, R. S. 1843, alleged that the defendant "did then and there suffer his house, building, room, arbor, booth, shed and tenement, to be used and occupied for gaming." *Held*, that the count was not liable to objection for duplicity.—*The State* v. *Alsop*, 141

3. It was alleged in the second count that the defendant, "at and in the county aforesaid, did then and there knowingly keep, and suffer his house," &c., "to be used," &c. The venue, *Posey* county, had been distinctly stated in the introduction to the indictment. *Held*, that it sufficiently appeared in both counts, that the house, &c., were situate in that county. *Ibid.*

4. Motion to quash an indictment. The clerk recited in the record the impanneling of the grand jury, their names, and that one of them was afterwards discharged and another sworn and sent to the grand-jury room in his stead. *Held*, that even admitting that the matter recited by the clerk was properly before the Supreme Court as a part of the record, the motion should have been overruled.—*The State* v. *Wingate*, 193

5. An indictment for receiving usurious interest upon a note, did not allege the place where the note was made. *Held*, on motion to quash, that the omission was fatal.—*The State* v. *Williams*, 234

6. Where any positive fact is averred in an indictment, it should be stated to have been done "*then and there*," after the county has been clearly expressed in the body of the indictment; and the allegation of time and place, "then and there," should be repeated to every material fact which is issuable and triable. *Ibid.*

7. An indictment for selling spirituous liquor by retail, without license, which omits to state a price for which the liquor was sold, is bad on motion to quash.—*Divine* v. *The State*, 240

8. After verdict against a defendant indicted for retailing spirituous liquor without license, a motion for a new trial will not be granted because the price for which the liquor was sold was omitted in the indictment.—*Hare* v. *The State*, 241

9. It is not clear that a motion in arrest of judgment would be sustained for that omission. *Ibid.*

10. The motion for a new trial does not go to the indictment. *Ibid.*

11. In the absence of any other specified cause, it is directed to the sufficiency of the evidence. *Ibid.*

12. An indictment charging the defendant with receiving and concealing stolen goods, is not bad for duplicity.—*Keefer* v. *The State*, 246

13. A defendant may be charged in one count of an indictment with stealing and in another with receiving stolen goods. *Ibid.*

14. A formal statement that an indictment was found by the authority of the state, is not necessary, if it appear from the record that the prosecution was in the name of the state.—*Cruts* v. *The State*, 385

15. An indictment for retailing spirituous liquor charged that the defendant unlawfully bartered and sold, &c., one pint of spirituous liquor, but did not state, in terms, that the quantity sold was less than a quart. *Held*, that the charge was sufficient.—*Willard* v. *The State*, 407

16. Indictment against a justice of the peace, under s. 83, c. 53, R. S. 1843, for

an improper refusal to grant a change of venue and the rendition afterwards of a judgment against the defendant without his consent. The indictment charged that the defendant rendered the judgment *corruptly*, but did not state that he knew his decision to be in violation of law. *Held*, that even if an indictment would lie for the acts charged, the indictment in question was bad.—*The State* v. *Rose*, 541

17. An indictment for a riot, after describing the time and place of the commission of the offence presented, charged that *A. B.*, *C. D.*, and *E. F.* riotously, routously and unlawfully gathered and assembled together, and then and there did riotously, &c., make a great noise, tumult and disturbance, to the terror of the citizens, &c., contrary, &c. *Held*, that the words were sufficiently descriptive of a riot.—*The State* v. *Voshall et al.*, 589

18. The day and year when an offence is charged in an indictment to have been committed, should be expressed in the indictment at full length, and not in figures. *Ibid.*

19. In an indictment for an affray, it is sufficient to allege the county where the offence was committed, without specifying the township.—*The State* v. *Warner*, 604

20. An indictment was as follows: State of *Indiana*, *Delaware* county, ss. In the *Delaware* Circuit Court, *September* Term, 1851. The Grand Jurors for the State of *Indiana* upon their oath present, &c. *Held*, that it sufficiently appeared that the grand jury sworn and impanneled at that term in *Delaware* county, was meant.—*The State* v. *Kiger*, 621

INDORSEMENT.

See ASSIGNMENT. PROMISSORY NOTE, 1 to 3, 6, 14, 17 to 25, 31.

INFAMY.

See CRIMINAL LAW, 2.

INFORMATION.

See GAMING. INDICTMENT.

1. An information for retailing spirituous liquor without license, was founded upon an affidavit alleging that the defendant did, on, &c., at, &c., unlawfully keep a certain house wherein spirituous liquors were sold, directly and indirectly, without license, in a less quantity than one gallon; and had, by himself and barkeeper, suffered the same to be drank in and about said house and premises, and sold the same to *A. B.*, to-wit, one drink, &c. *Held*, that the affidavit did not support the information.—*The State* v. *Lockstand*, 572

2. An information for retailing spirituous liquor without license, contained no averment of the price for which the liquor was sold. *Held*, that the information was defective. *Ibid.*

3. An information, under the R. S. 1852, must contain all the substantial requisites of an indictment at common law.—*The State* v. *Miles*, 577

4. An information for retailing spirituous liquor which does not allege a price for which the liquor was sold, is bad. *Ibid.*

5. The law in relation to exceptions in a statute is, that if the exception be contained in a subsequent clause or statute, it is matter of defence, and need not be negatived in the information; but if it be closely connected with the enacting clause, or if it be in the same clause of the act which creates an offence, it is necessary to show by negative averment that the defendant is not within the exception.—*Brutton* v. *The State*, 601

6. An information under the first section of the liquor act of 1853, for retailing spirituous liquor without license, did not aver that the liquor was not sold for sacramental, mechanical, chemical, medicinal, or culinary purposes. *Held*, that the information was bad on motion to quash. *Ibid.*

7. An information for retailing spirituous liquor should state the price for which the liquor was sold. *Ibid.*

8. An information for retailing under the liquor act of 1853, stated that the defendant sold less than a gallon, without otherwise specifying the quantity. *Held*, that the information was bad, on motion to quash. *Ibid.*

9. The defendant was convicted for retailing, under the first section of the liquor act of 1853, neither the affidavit nor the information alleging that the liquor was sold for mechanical, medicinal, or culinary, &c., purposes. That section provides that no person shall retail spirituous liquors, except for sacramental, mechanical, chemical, medicinal, or culinary purposes, without filing with the auditor his bond, &c. *Held*, that the conviction was wrong.—*Brutton* v. *The State*, 602

10. An information under the liquor act of 1853 which does not allege that the liquor was not sold for sacramental, mechanical, chemical, medicinal or culinary purposes, is bad, on motion to quash.—*Lemon* v. *The State*, 603

INJUNCTION.

See CERTIFICATE FOR CANAL LAND, 3. CHANCERY, 4, 8.

1. The only mode of bringing before the Supreme Court the order or decree of an inferior Court granting or dissolving an injunction is, by the R. S. 1843, by appeal.—*Bradley* v. *Bearss et al.*, 186

2. Bill to enjoin the sheriff from levying upon and selling certain land because it was not the property of the judgment-defendant but that of third persons. *Held*, that the penalty and condition of the bond were to be regulated by s. 133, c. 46, R. S. 1843.—*The State Bank et al.* v. *Macy et al.*, 362

3. Where the substantial matters alleged in a bill for an injunction are positively denied by the answer, the injunction should be dissolved.—*Case* v. *Green*, 526.

INSOLVENT.

See IMPRISONMENT FOR DEBT.

INSTRUCTIONS.

1. A witness for the defendant having testified at the trial to the general bad character of a witness for the plaintiff for truth and veracity, the latter, at the rising of the Court, assailed and beat him therefor. The counsel for the plaintiff was permitted to argue that the fact of such beating was an evidence of the credibility of the assailant. The Court instructed the jury, in effect, that what had been said by the plaintiff's counsel as to said attack was not in evidence, but was a matter of public notoriety, though not a matter properly before the jury; but that, in the opinion of the Court, a man who had the courage and will thus to meet a charge, was usually one who had such a sense of honor that he would not place himself in a position where a charge could be justly made, &c. *Held*, that the instruction was impertinent, and pernicious in its tendency, and ought not to have been given.—*Travis* v. *Barkhurst*, 171

2. A judgment will not be reversed because an erroneous instruction was given to the jury, where the evidence would not have supported a verdict for the party complaining of the instruction.—*Conwell* v. *Emrie*, 209

3. Where the verdict is fully sustained by the evidence, it will not be set aside because an erroneous instruction was given to the jury.—*Rogers* v. *Maxwell*, 243

4. Where the evidence is not set out in the record, it will be presumed that the instructions given to the jury were pertinent and applicable to the case.—*Hand et al.* v. *Taylor*, 409

5. Where the verdict and judgment are fully supported by the evidence, it is immaterial what instructions the Court gave to the jury.—*Muirhead* v. *Snyder*, 466

6. Where the evidence fully supports the verdict, the judgment will not be reversed on account of an instruction given to the jury which was not strictly correct.—*Clifton* v. *Shannon*, 498

7. Where the evidence is not set out in the record, and the instructions given were correct, if a state of proof existed to which they were applicable, they will be presumed to have been pertinent.—*Downey* v. *Day*, 531

8. Where the verdict is in accordance with the evidence, it is immaterial what instructions were given or refused.—*Watson* v. *Allen*, 537

9. A party excepting under s. 325, p. 112, vol. 2, R. S. 1852, to the refusal of the Court to give instructions asked, must, by himself or his attorney, sign the memorandum "refused and excepted to" written at the close of each of such instructions.—*Ledley* v. *The State*, 580

10. Section 325, p. 112, vol. 2, R. S. 1852, applies only to civil cases. *Ibid.*

11. Exceptions to instructions must, under the practice prior to the R. S. 1852, have been taken at the time they were given, or they were unavailable. *Ibid.*

INSURANCE.

See WITNESS, 8.

INTERNAL IMPROVEMENTS.

See BURDEN OF PROOF, 1. CONTRACT, 1. LIMITATIONS, STATUTE OF, 1 TO 4. REMEDY, 1, 2. STATUTES, 16.

1. A member of the board of public works could not, under the internal improvement act of 1836, approve or disapprove of a

contractor's work.—*The State* v. *McGinley*, 7

2. The internal improvement act of 1836, except so far as it conflicts with the acts transferring the various public works, has not been repealed; and the Supreme Court has constantly regarded it as entering into and forming a part of the various acts conveying away, for construction, the public works, so far as consistent with those acts.—*Null et al.* v. *The White Water, &c., Canal Company*, 431

J.

JUDGMENT.

See EXECUTORS AND ADMINISTRATORS. FRAUDULENT CONVEYANCE, 3. PARTIES, 1. PRACTICE, 2. REPLEVIN BAIL, 1 TO 4. STAY OF EXECUTION, 1.

1. *A.* purchased of *B.* a tract of land in *Noble* county, received a deed, and simultaneously executed to *B.* a mortgage to secure an unpaid balance of the purchase-money. When *A.* received the deed there was a judgment against him in the *Noble* Circuit Court in favor of one *C.* *A.* afterward sold the land to one *D.*, who assumed the payment of the mortgage as a part of the consideration, and paid the rest of the purchase-money. *Held*, that the lien of the judgment attached subject to the lien of *B.'s* mortgage. *Held*, also, that *D.*, by paying the mortgage to *B.*, became substituted as against *C.* in the place of *B.*, and entitled to all his rights and equities. —*Peet* v. *Beers*, 46

2. Judgments against *A.* and *B.* in the Circuit Court. The judgments having become dormant, a *scire facias* was issued on each of them, and served on *B.*, the survivor, and there was a judgment of revivor. That in the first case was as follows: "On motion, it is ordered that the judgment heretofore rendered in this case, be revived against *B.* as administrator of *A.*, and against *B.* (the former judgment having been rendered against *B.* and *A.*) and the defendant in mercy," &c. The judgment of revivor in the second case, was as follows: "The parties appeared, and, on motion, the same orders." *Held*, that the judgments of revivor, though informal, were not void.—*Law et al.* v. *Smith et al.*, 56

3. The issuing of an alias *fi. fa.* while the levy under the first is undisposed of, cannot affect the lien of the judgment.—*Doe d. Murphy et al* v. *Hayes et al.*, 117

4. *S.*, by *V.*, his attorney, during the term of the Circuit Court, filed a declaration in assumpsit, setting forth as the foundation of the action, two promissory notes executed by *H.*, one of which was not then due, and would not be for six months thereafter. *V.* also filed a warrant of *H.* to confess judgment on the notes. The warrant was directed to *V.*, authorizing him, in the usual form, to confess judgment, &c. The record showed that the execution of the warrant was duly proved to the satisfaction of the Court; the declaration and warrant appeared therein at full length; and immediately thereafter, without any intervening matter, the record proceeded thus: "And the said defendant now here waives the issue and service of process herein, and says that he cannot gainsay the plaintiff's action, nor but that he hath sustained damages by reason of the non-performance in said declaration mentioned, in the sum of," &c., being the amount of both notes. Judgment accordingly for that sum. The declaration alleged a promise to pay, in the usual form, *according to the tenor and effect of the notes*. *Held*, that the judgment was not entered by virtue of the warrant of attorney. *Held*, also, that if the confession were supposed to be a personal one, a judgment for the amount of both notes, would, under the declaration, have been unauthorized. *Held*, also, that the structure of the record precluded the idea that *V.*, or any other attorney, appeared for *H.* *Held*, also, that the terms used, "the defendant now here waives," &c., taken in connection with the context and the circumstances, do not authorize the conclusion that *H.* appeared in open Court and confessed the judgment. —*Harris* v. *Stanton*, 120

5. The fact that the prosecuting attorney has refused to enter a *nolle prosequi* against a person indicted for burglary who has given testimony which led to the conviction of an accomplice under a promise of favor upon the disclosure of the whole truth, cannot affect the judgment against such convicted accomplice.—*Dawley* v. *The State*, 128

6. A judgment against a defendant upon a warrant of attorney will be held to be erroneous, unless the record shows that he appeared to the action in person or by attorney, or process was served upon him, or he was notified in some mode prescribed by law.—*Coonley* v. *Tracy et al.*, 137

7. The provisions of s. 339, c, 40. R. S. 1843, are applicable only where there is an action pending against the defendant, and he appears at the time when he offers and

consents in writing that judgment may be entered against him. *Ibid.*

8. The existence and terms of a judgment must be established by the production of the record.—*Laney* v. *Laney et al.*, 149

9. A judgment by *nil dicit*, where pleas remain undisposed of, is erroneous.—*Young et al.* v. *The State Bank*, 301

10. *A.* obtained judgment against *B.* before a justice of the peace, and filed transcripts in the clerk's office and had them recorded, to bind *B.'s* land. Before he had procured an order for an execution, *B.'s* land was advertised for sale on an execution issued upon an older judgment. To prevent the sale, in order to procure an assignment of such older judgment, *A.* was advised by his attorney, who was also the attorney of the execution-plaintiff, to put in the sheriff's hands a sum sufficient to satisfy the execution, whereupon he, the attorney, would order a postponement of the sale to allow *A.* time to procure the assignment. *B.* accordingly paid that sum to the sheriff, he and the attorney stating to the sheriff that the money was not paid in satisfaction of the judgment, but merely to prevent a sale of the land in order to give *A.* the control of the execution and judgment. *Held*, that the handing of the money to the sheriff did not operate to satisfy the judgment.—*Strange et al.* v. *Donohue*, 327

11. A judgment against an administrator, as such, to be paid out of the estate of the deceased, is not substantially, but merely nominally, a judgment against him: it is a judgment against the estate upon which he administers, and is never to be paid unless the estate is able to pay it.—*Egbert* v. *The State*, 399

12. Such a judgment was not, by the R. S. 1843, repleviable. *Ibid.*

13. A person, by acknowledging himself a replevin bail upon such a judgment, did not, under the R. S. 1843, become liable for the debt. *Ibid.*

14. In an action by an administrator to recover a debt due to the intestate, the declaration concluded, "to the damage of the plaintiff, administrator as aforesaid," &c. No objection was made to the declaration in the Circuit Court, the counts showed plainly enough that the plaintiff was suing as administrator, and the judgment was rendered in the proper form. *Held*, that the judgment ought not to be disturbed.—*Durham* v. *Hudson*, 501

15. A judgment, where the case is tried by the Court, can be set aside only on the same preponderance of evidence that would invalidate a verdict.—*Dunlap* v. *Jones*, 641

JURISDICTION.

See ADMINISTRATOR'S SALE, 1 to 4. COMMON PLEAS, COURT OF. PLEADING, 3. SPECIFIC PERFORMANCE, 2. SUPREME COURT, 1, 4.

Under ss. 148, 150 and 157 of c. 47 of the R. S. 1843, the Circuit Court had no jurisdiction in a proceeding by *scire facias* on a justice's transcript to bind real estate, where the transcript was not filed in the clerk's office within two years from the rendition of the justice's judgment, or the return of the execution that no property could be found, &c.—*Ousgat* v. *Dils*, 545

JURY.

See EVIDENCE, 18.

1. A person who has formed an opinion on the merits of a cause from information derived from conversation with the witnesses, is incompetent to sit upon the jury.—*Goodwin* v. *Blachley et al.*, 438

2. The defendant, against whom a verdict was rendered, was present in person and by counsel, at the impanneling of the jury and at the trial, and upon a motion made by him to set aside the verdict and grant a new trial, no objection was made to the cause having been tried by an improper number of jurors. *Held*, that he could not, therefore, object, on error, that the cause was tried by eleven instead of twelve jurors.—*Durham* v. *Hudson*, 501

3. In a civil case, the objection that a cause was tried by less than a competent number of jurors, will be held to be waived, as against the party who consented thereto. *Ibid.*

4. The record of a cause stated that the jury that tried it was composed of twelve persons, but in enumerating the names, upon the assumption that each juror's christian name was intended to be prefixed, only eleven were mentioned. *Held*, that the presumption still was that the jury was composed of twelve persons. *Ibid.*

JUSTICE OF THE PEACE.

See APPEAL. COSTS, 1. EXECUTION, 10. LANDLORD AND TENANT, 1. PLEADING, 3, 4, 12, 13. PROMISSORY NOTE, 9. RECOGNIZANCE. REPLEVIN BAIL. SCIRE FACIAS.

1. When a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute.—*Bargis* v. *The State*, 126

2. An act of 1849 conferred upon justices of the peace in certain counties, exclusive jurisdiction over certain offences, and enacted that they should, "on complaint under oath, or on view, take jurisdiction of all such offences." *Held*, that the justice could not render a judgment against an offender, upon confession of any such offence, except on such complaint or on view. *Ibid.*

3. To an action on the official bond of a justice of the peace for his refusal to pay over to a judgment-plaintiff bank notes received by him in payment of the judgment, it is no answer that the notes were taken, while in his possession, upon an execution against the plaintiff.—*Hooks* v. *York et al.*, 636

4. Suits upon the official bond of a justice of the peace were required by the R. S. 1843 to be brought in the name of the state, for the use, or upon the relation of the party interested. *Ibid.*

L.

LACHES.

See PROMISSORY NOTE, 5, 25, 26.

LANDLORD AND TENANT.

See STATUTE OF FRAUDS, 2, 3.

1. *A.*, by agreement in writing, leased to *B.* a field to be tilled in corn, containing about thirty acres, for one year from *March* 1, 1849; and *B.*, for the use of the field, was to give as rent one-third of the crop husked and delivered in the crib which *A.* was to furnish in the field. The corn was to be husked and cribbed on or before the 1st of *January*, 1850. The agreement then proceeds: The said *B.* is to move into the dwelling-house where *C.* now lives, and to have the privilege of firewood by using dead timber unfit for rails. *Held*, that the agreement rendered it obligatory upon *A.* to furnish *B* a house to live in during the term of his lease. *Held*, also, that in an action by *B.* before a justice of the peace for the neglect and refusal of *A.* to furnish the house, an averment in the cause of action of a demand by *B.* of the house was not necessary, even if the demand were necessary to be proved in order to maintain the suit. *Held*, also, that it was competent for *B.* to prove, by parol, that the house was situate on the premises leased.—*Maggart* v. *Chester*, 124

2. When a lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also, and *vice versa*.—*Doe d. Pidgeon* v. *Richards*, 374

3. The lessor may determine the lease by notice to quit. *Ibid.*

LAND-OFFICE CERTIFICATE OF PURCHASE.

See STATUTES, 11.

LAND-OFFICE RECEIPT OF FINAL PAYMENT.

See STATUTES, 11.

LEASE.

See COVENANT, 7 to 12. EXECUTORS AND ADMINISTRATORS, 2. LANDLORD AND TENANT. STATUTE OF FRAUDS, 2, 3.

LEGISLATURE.

See CONSTITUTIONAL LAW, 4 to 10. LIMITATIONS, STATUTE OF, 4. NEW TRIAL, 3. NUISANCE, 2. STATE PRINTER, 1, 6, 7 to 10.

LEVY.

See JUDGMENT, 3.

A levy is *prima facie* a satisfaction of the execution; but it may be shown to have proved to be not an actual one.—*Law et al.* v. *Smith et al.*, 56

LICENSE.

See BOARD OF COMMISSIONERS, 2 to 5. BURDEN OF PROOF, 2. CONSTITUTIONAL LAW, 12, 15. RETAILING, 4, 5.

LIEN.

See CHANCERY, 7, 9, 10. EXECUTION, 2. JUDGMENT, 1, 3. VENDOR AND PURCHASER, 2.

1. A vendor's lien for unpaid purchase-money follows the land in the hands of a purchaser from his vendee with notice that part of the purchase-money is unpaid; but the burden of proof is on the vendor.—*McCarty et al.* v. *Pruett*, 226

2. A creditor can obtain a lien by filing his bill in equity only where no lien has been gained or can be acquired at law.—*Hubbs et al.* v. *Bancroft et al.*, 388

LIMITATIONS, STATUTE OF.

See PLEADING, 28. REPLEVIN BAIL, 5. SHERIFF, 8.

1. A proceeding properly instituted for the recovery of a claim, but voluntarily abandoned, cannot be made available, in an action subsequently brought, to save the claim from the bar of the statute of limitations.—*Null et al.* v. *The White Water, &c., Canal Co.*, 431

2. The *White Water Valley Canal Company*, in 1845, took possession of certain land of the plaintiffs, for the construction of their canal, and, in the prosecution of the work, diverted water from his mills. In about eighteen months afterward, the water was returned to the plaintiffs, and to its natural channel, by a freshet that washed away the canal; but the company, in 1849, in repairing the canal, again diverted the water as they had previously done. *Held*, that the statute of 1836, enacting that applications for damages for property taken for the construction of the public works, should be made within two years next after the same was taken possession of, or they should not be paid, commenced running at the first diversion of the water in 1845. *Ibid.*

3. That statute is not founded upon the presumption that the damages have been actually paid within the two years, but upon the ground that two years is a reasonable time for asserting the claim, and that, if it is not asserted in that time, it should be disregarded, and the cost of the public works thereby lessened. *Ibid.*

4. The legislature had the power to enact such a law. *Ibid.*

5. The statute of limitations of 1843 does not bar actions on judgments of a court of record, which have been rendered 20 years; but only raises a presumption of payment by lapse of time.—*Barker* v. *Adams*, 574

LIQUOR, SPIRITUOUS.

See SPIRITUOUS LIQUOR.

LOST PLEA.

See EVIDENCE, 2.

M.

MALICIOUS PROSECUTION.

1. In an action for the malicious prosecution of a criminal charge against the plaintiff, malice can not be inferred from the fact that the defendant employed counsel to prosecute the charge.—*Lawrence* v. *Lanning*, 194

2. The mere belief that a person has been guilty of a crime, is not sufficient to authorize a criminal prosecution against him. There must be reasonable and probable cause for the prosecution. *Ibid.*

MANDAMUS.

See WABASH AND ERIE CANAL.

MARRIAGE.

1. The term "marriage contract" is applied to the public ceremony of marriage and to the prior contract to marry which that ceremony implies.—*Develin* v. *Riggsbee*, 464

2. A female at the age of eighteen years is, in this state, as to the power to enter into a marriage contract, an adult. *Ibid.*

3. A female over eighteen and under twenty-one years of age, may, in this state, make a valid release of a contract to marry. *Ibid.*

4. A marriage may be presumed from cohabitation and reputation; but the presumption, like other presumptions of fact, may be rebutted.—*Nossaman et al.* v. *Nossaman*, 648

5. Where a cohabitation is shown to have been known by the parties to be adulterous in its origin, a lawful wife being then alive, no presumption of the death of, or a divorce from, such wife will be indulged in favor of the guilty parties. *Ibid.*

6. Affirmative evidence is necessary in such a case to establish the death of, or a divorce from, the lawful wife. *Ibid.*

7. It will not be presumed, in order to establish a presumptive marriage, that either the parties or officers violated the law. *Ibid.*

8. The clerk of one county could not, under the R. S. 1843, issue a license for the marriage of a female who was a resident of another county. *Ibid.*

MISDEMEANOR.

See FORMER CONVICTION, 1.

Section 3, p. 431, vol. 1, R. S. 1852, contains a saving clause as to all misdemeanors committed under the prior law.—*The State* v. *Kiger*, 621

MISTAKE.

See CHANCERY, 8.

MONEY HAD AND RECEIVED.

See ASSUMPSIT. PROMISSORY NOTE, 31.

MORTGAGE.

See CHANCERY, 3. JUDGMENT, 1. PROMISSORY NOTE, 14, 27. REGISTRY, 1. SUBSTITUTION.

1. The maxim in relation to mortgages is, that "once a mortgage always a mortgage."—*Davis et al.* v. *Stonestreet*, 101

2. Courts of Equity do not favor conditional sales; and they will pronounce that a mortgage which, at law, would be a conditional sale. They are disposed to consider every deed, whatever be its form, which resolves itself into a security for the performance of any act, as a mortgage. *Ibid.*

3. Where a party advanced money to another, and for his security took an instrument from the latter, from the language of which it was doubtful whether a conditional sale of land or a mortgage was intended, but took no note for the money advanced, *held*, that the omitting to take the note was not conclusive that a conditional sale was intended. *Ibid.*

4. Where from the language of an instrument it is difficult to determine whether a conditional sale or a mortgage of lands was intended, if the price was grossly inadequate, it will be construed to be a mortgage. *Ibid.*

5. The assignment of one of several notes secured by a mortgage is an equitable assignment, *pro tanto*, of the mortgage.—*Stanley* v. *Beatty et al.*, 134

6. The person holding the note which first becomes due, is entitled first to be satisfied out of the proceeds of the mortgage. *Ibid.*

7. The holder of one of several notes secured by mortgage is not obliged first to sue at law upon the notes, but he may, in the first instance, proceed in chancery for foreclosure. *Ibid.*

8. A mortgage not acknowledged or proved, cannot, under the R. S. 1843, be properly admitted to record.—*Reed et al.* v. *Coale et al.*, 283

9. The R. S. 1843 do not authorize the recording of the assignment of a mortgage. *Ibid.*

10. Bill to foreclose a mortgage upon premises a part of which had been aliened after the execution of the mortgage, but before the filing of the bill. Decree for the sale of the whole premises. The record did not show that the part of the lot not aliened was sufficient to discharge the amount of the decree and costs, nor that the Court improperly exercised its power in decreeing the sale of the whole. *Held*, that under the R. S. 1843, the decree was not objectionable.—*Watts et al.* v. *Palmer*, 575

MOTION FOR A NEW TRIAL.

See NEW TRIAL, 4, 5, 10. PRACTICE, 9, 11, 12, 13, 15.

MOTION IN ARREST OF JUDGMENT.

See CRIMINAL LAW, 5. PRACTICE, 10, 13, 14, 16.

MOTION TO QUASH.

See COMPLAINT, 1.

N.

NAME.

Every person is presumed to have a christian name until the contrary is shown.—*Gardner* v. *The State*, 632

NAVIGATION, OBSTRUCTION TO.

See TERRE-HAUTE DRAWBRIDGE COMPANY.

NE EXEAT.

Proceeding before a justice of the peace, under the act of 1847, for a *writ of ne exeat*. The affidavit did not contain an allegation that the defendant was taking with him property subject to execution. The defendant having, upon the requirement of the justice, given special bail, afterwards, but within thirty days from the decision of the justice, took an appeal to the Circuit Court. The plaintiff, in the Circuit Court, moved to dismiss the appeal. The motion having been overruled, the defendant (who had not objected to the affidavit before the justice) moved to dismiss the suit for the omission in the affidavit of said allegation, whereupon the plaintiff interposed a motion to amend by supplying the omitted allegation. *Held*, that the motion to dismiss the appeal was properly overruled. *Held*, also, that the amendment of the affidavit should have been allowed.—*Louderback* v. *Rosengrant*, 563

NEGATIVE.

See EVIDENCE, 13.

NEGLIGENCE.

See CHANCERY, 5, 6. DAMAGES, 2. PROMISSORY NOTE, 5, 25, 26.

1. The owners of a steamboat, knowing the manner in which a flat-boat is fastened to the shore, are liable for the loss of the flat-boat and cargo occasioned by waves created by the steamboat while running out of the usual channel for such boats, under a full head of steam, near to the flat-boat—if the persons in charge of the flat-boat have used all proper efforts to save the boat and diminish the damage occasioned by the waves.—*Wright et al.* v. *Brown*, 95

2. It is no answer to an action brought for the loss, under such circumstances, that if the flat-boat had been tied to the shore in an ordinarily secure manner, it would have escaped injury. *Ibid.*

NEW TRIAL.

See PRACTICE, 4, 6, 9, 11, 12, 13 to 16.

1. On a motion for a new trial on the ground that certain facts can be proved by an absent witness, the affidavit of the witness should be produced if it be practicable to obtain it.—*Priddy* v. *Dodd*, 84

2. As a general rule, surprise from unexpected evidence adduced by the adverse party, is not a sufficient ground for a new trial.—*Travis* v. *Barkhurst*, 171

3. The legislature has not the power to grant a new trial of a suit at law.—*Young et al.* v. *The State Bank*, 301

4. A party who has moved for a new trial at law, and the motion having been overruled on the merits, has prosecuted a writ of error for the refusal of his motion, to final judgment against him, cannot afterwards sustain a bill in chancery for a new trial, founded upon the same reasons alleged therefor at law.—*Davis* v. *Bass et al.*, 313

5. Where, on a motion for a new trial, the inquiry arises, what was the evidence given to the jury, an affidavit of the defendant as to his belief of what was proved, derived from recollection, or from information received from the jury or his counsel, will be allowed no weight against the ruling of the Court.—*Keck* v. *Umphries*, 492

6. Slander for charging the defendant with larceny. Plea, not guilty. Verdict for the plaintiff. The defendant moved for a new trial on the ground that the words proved on the trial, if spoken at all, were not spoken on the occasion alleged by the witness, but on a subsequent one. Neither of the affidavits offered in support of the motion, denied the speaking of the words. *Held*, that they did not, therefore, sustain the motion. *Ibid.*

7. New trials are rarely, if ever, granted to give an opportunity to impeach the credit of a witness. *Ibid.*

8. Where a party has had ample time to prepare for trial, and witnesses by whom he could have proved important facts were in his neighborhood, and being aware of their knowledge of such facts, he did not examine them on the trial, on account of a distrust of his ability to elicit the truth, he cannot obtain a new trial in order to avail himself of their testimony.—*Taylor* v. *The State*, 540

9. A verdict will not be set aside to admit evidence to impeach the credit of a witness, unless such evidence is strong, and pointed directly to the merits, so as to raise a violent presumption of its being successful with the jury. *Ibid.*

10. The refusal of the Circuit Court to grant a motion for a new trial on account of newly discovered evidence, will not be disturbed where such evidence does not seem obviously sufficient to change the result upon a new trial.—*Hull* v. *Kirkpatrick*, 637

NEXT FRIEND.

The declaration in a suit brought by an infant, did not show that the next friend named therein was admitted by the Court, nor that he filed his consent to act as such, agreeably to the statute; but no objection was made to the declaration, on that account, before verdict. *Held*, that, after verdict, the objection must be considered as waived.—*Wortman* v. *Ash*, 74

NON-RESIDENCE.

See CHANCERY, 5, 6.

NOTICE.

See REGISTRY, 1.

Where land of a judgment-debtor is sold at sheriff's sale to satisfy the judgment, the record is constructive notice of all the proceedings under the judgment.—*Neal et al.* v. *Pressell et al.*, 594

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2, 3.

NUISANCE.

1. Prosecution for a nuisance under s. 17 of the act of *March*, 1853, regulating the retail of spirituous liquors. There was evidence tending to prove that the defendant, on a single occasion, sold liquor by a less quantity than a gallon, and suffered it to be drank in his house. It ap-

peared also that he had bottles of different kinds of liquor usual in retail establishments. *Held*, that it was for the jury to say whether this evidence was sufficient; and having so decided, in a matter peculiarly within their province, the verdict ought not to be disturbed.—*Bepley* v. *The State*, 264

2. It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly. *Ibid.*

3. The backing of water over a public highway to the injury and annoyance of the public, by the erection of a mill-dam, is a common nuisance.—*The State* v. *Phipps*, 515

4. An indictment will lie for maintaining such a nuisance. *Ibid.*

5. To an indictment for maintaining such nuisance, it is no defence, under the R. S. 1843, that the defendant may have acquired a right, by virtue of a writ of *ad quod damnum*, to the use of the land of individuals on which the highway runs, for the purpose of flowing the water upon the land. *Ibid.*

6. Neither is a prescription from a twenty years' continuance of the nuisance, a defence. *Ibid.*

O.

OBSTRUCTION.

See TERRE-HAUTE DRAWBRIDGE COMPANY.

OCCUPYING CLAIMANT.

After judgment in ejectment in the Circuit Court for the lessor of the plaintiff, the defendant filed a petition under the occupying claimant law, which was resisted; and the president judge being absent, the associate judges, who were divided in opinion, placed the result of their deliberations upon record as follows: Being divided in opinion we cannot agree upon the propriety of allowing or overruling said motion. Then followed the petition. No judgment was rendered, nor motion interposed at the proper time for a new trial, nor bill of exceptions taken, nor was the evidence inserted in the record.

Held, that there was no action of the Court from which either party could appeal or prosecute a writ of error.

Held, also, that in legal contemplation, the petition was still pending in said Court; and, *semble*, that on motion a judgment might yet be entered *nunc pro tunc*, or the petitioner might have the petition docketed and proceed *de novo*.

Semble, also, that after judgment in ejectment, a proceeding commenced under the occupying claimant law of 1843 is invested with the attributes of an independent action, and may, the judgment in ejectment being suffered to rest, be the subject of an appeal to the Supreme Court.

Semble, also, that an appeal by the defendant from the judgment in ejectment could not be taken as a waiver of his claim as an occupying claimant.—*Graham* v. *Doe*, 615

OFFICE.

See STATE PRINTER, 2 to 5.

1. An office may exist without any duties attached to it.—*Jones* v. *Cavins*, 305

2. *A.* was elected, at the regular election in 1849, a district trustee, under s. 39 of the act of 1849 to increase and extend the benefits of common schools. No election was held in 1850. *Held*, that *A.* was thereby continued in office, and that an appointment by the township clerk of another person in his stead, under the act of 1850, amendatory of said section, was void.—*Stewart et al.* v. *The State*, 396

OFFICER.

See EVIDENCE, 15. OFFICE. STATE PRINTER.

Proof that a person is acting notoriously as a public officer, and is generally recognized as such, is *prima facie* evidence of his official character.—*Swails* v. *The State*, 516

OPENING AND CLOSE.

See BURDEN OF PROOF. PLEADING, 21, 29. PRACTICE, 22.

P.

PARTIES.

See PRACTICE, 24 to 26. RELATOR, 1, 2. SCIRE FACIAS, 2.

1. Judgment against *A.* and *B.* *A.* having died, and the judgment having become dormant, it was revived by *scire facias* against *B.* and *A.'s* administrator, *A.'s* heirs not having been made parties. When the debt was contracted, and the proceedings upon *scire facias* had, the real estate of a decedent was subject to sale, by statute, upon a judgment against his administrator, without notice to the heirs. *Held*, that it was, therefore, only necessary to join the administrator of *A.* with *B.* to obtain a judgment on *scire facias*, on which the lands of *B.*, and those which *A.'s* heirs had inherited from him, could be sold.—*Law et al.* v. *Smith et al.*, 56

2. A suit upon a note, must, under the R. S. 1843, be brought in the name of the party having the legal interest.—*Jamison* v. *Jarrett*, 187

PARTNERSHIP.

1. When a partner sells to a stranger his interest in the partnership goods, the stranger cannot, on refusal of the co-partner on demand to admit him as a partner, maintain replevin for the goods.—*Reece* v. *Hoyt*, 169

2. The sale by a partner of his interest in the partnership effects, dissolves the partnership, and the partner who has not disposed of his interest, has a right to the possession of the effects for the purpose of settling up the partnership, and the purchaser cannot interfere unless for good cause shown. *Ibid.*

PART PERFORMANCE, RECOVERY UPON.

See CONTRACT, 3, 4, 14.

PATENT.

See PLEADING, 31.

The patent act of 1836, requiring the assignment of a patent to be recorded within three months from its execution, is merely directory, and for the protection of *bona fide* purchasers, and does not require the recording of an assignment within that time as a prerequisite to its validity.—*Louden* v. *Birt*, 566

PAYMENT.

See BURDEN OF PROOF, 3.

PLEADING.

See ACCORD AND SATISFACTION. BASTARDY, 3. BURDEN OF PROOF, 3. CONTRACT, 12, 14. COVENANT, 7 to 12. EVIDENCE, 2, 12. JUDGMENT, 14. LANDLORD AND TENANT, 1. PRACTICE, 2, 3. PROMISSORY NOTE, 12.

1. A plea which professes to answer a whole count, but answers only a part, is bad on general demurrer.—*Puett et al.* v. *The State Bank*, 45

2. To the declaration upon a promissory note, the defendant pleaded as to part, &c., that the plaintiff agreed to assign him a judgment against one *B.* of the amount which the plea professed to answer, and that as to so much, &c., that agreement was the consideration of the note; that the judgment was assigned, but "without recourse" upon the assignor; and so the consideration as to so much, &c., had failed. *Held*, that the plea was bad, it not appearing that the defendant had placed or offered to place the parties in the position they occupied prior to the assignment. *Ibid.*

3. The declaration in a suit for trespass before a justice of the peace, contained two counts. The first concluded "to the damage of the said plaintiff in the sum of fifty dollars, and he sues," &c. The conclusion of the second count was as follows: "Whereupon, by reason of all the foregoing premises, the plaintiff saith that he is injured and hath sustained damage to the amount of fifty dollars, and he sues," &c. *Held*, that the words, "by reason of all the foregoing premises," must be restricted to the matters set forth in the second count; and that a motion to dismiss the suit, upon appeal in the Circuit Court, for the want of jurisdiction of the justice, was correctly sustained.—*Beinum* v. *Small*, 49

4. In a suit upon a bond of a justice of the peace, for the breach of any condition other than for the payment of money, the breaches were required by the R. S. 1843, to be assigned in the declaration.—*The State ex rel. Hunt* v. *Lane et al.*, 163

5. In a declaration for the breach of the covenant of warranty in a conveyance of land, an eviction must be alleged.—*Hannah* v. *Henderson*, 174

6. Usury may be given in evidence under the general issue.—*Starr* v. *Laws et al.*, 192

7. *Scire facias*, under the R. S. 1843, on the transcript of a justice's judgment, for an execution against real estate. The *scire facias* alleged that *A.*, *B.*, and *C.*, merchants trading under the name of *A. & Co.*, recovered a judgment under their firm name, &c. Pleas, 1. That *A.*, *B.*, and *C.* were not, at the time of the recovery of judgment, nor at any other time, partners under the name of *A. & Co.*, nor did they, as partners, or otherwise, recover the judgment, &c. 2. That *A.*, *B.*, and *C.* were not, at the commencement of the suit, nor are they yet, the owners of the judgment as partners under the name of *A. & Co.*, or otherwise. The pleas, not having been sworn to, were, on motion, rejected. *Held*, that the rejection was right.—*Forbes* v. *Tiffany et al.*, 204

8. Debt on three promissory notes under seal. Plea, that the consideration of the notes was the sale of a certain parcel of land, situate, &c., and that, at the time of making the notes, the plaintiff agreed to give the defendant a warranty deed for the land on the first payment, (which first payment was the note described in the declaration, payable 1st of *March*, 1847,) and to take a mortgage back as security, and that the plaintiff had not

conveyed nor offered to convey the land to the defendant upon the payment of the note payable on the 1st of *March*, 1847, and the execution of a mortgage by the defendant to secure the other notes given for said purchase-money. *Held*, upon demurrer, that the plea was sufficient to bar the action.—*Ellis* v. *Hubbard*, 206

9. A party by amending his plea after a demurrer has been sustained to it, waives his right to complain of the sustaining of the demurrer.—*Polleys et al.* v. *Swope*, 217

10. Assumpsit by executors on three promissory notes. Plea, that the notes described in the declaration, and another, of the same date, for 75 dollars, were all given to the testator in his lifetime, in consideration of the sale by the testator to the defendant of a certain tract of land, described therein, and for no other consideration whatever; that, at the time of the execution of the notes, the testator agreed to convey the land to the defendant on the payment of said several notes. Averment, that before the commencement of the suit the defendant had paid the 75 dollar note and 74 dollars on the first note described in the declaration, and that all the notes were due before the commencement of the suit; and that neither the testator in his lifetime, nor the plaintiffs, since his death, at any time before the commencement of the suit, had conveyed or offered to convey to the defendant the said land, upon the payment of the said notes. *Held*, that the plea was a bar to the action.—*Ireland* v. *Chauncey et al.*, 224

11. In actions *ex contractu*, where the defence is in its nature joint, several defendants may join in the same plea, or they may sever; and one defendant may plead in abatement, another in bar, and another may demur.—*Troutner et al.* v. *Parent*, 232

12. The only office of a plea before a justice that the title of lands will come in question, is to remove the cause to the Circuit Court, which then proceeds with it to final judgment as though it had been commenced in that Court.—*Love* v. *Bohan*, 235

13. That plea tenders no issue for trial, its effect being the same whether true or false. *Ibid.*

14. Debt upon a promissory note under seal. Plea, that the note, and two others, were given by the defendant to the plaintiff in consideration of the sale of a tract of land therein described, and for no other consideration; which land the latter agreed to convey to the former, by good warranty deed, on the payment of said notes. Averment, that one of the notes had been paid, to-wit, &c., and that, before the bringing of the suit, both of the remaining notes were due, but that the plaintiff did not, before the bringing of the suit, convey or offer to convey to the defendant the land, upon the payment of the notes. *Held*, that the plea was good.—*Best* v. *Ellsworth*, 261

15. Assumpsit by the assignees of an accepted bill of exchange against the acceptors. Pleas, the general issue, fraud, and want of consideration. General demurrers to the pleas of fraud and want of consideration. The entry following upon the record was—the cause is submitted to the Court for trial without the intervention of a jury, and, the evidence being heard, &c., the Court find for the plaintiffs, &c. *Held*, that it must be presumed that the issues of law and fact were submitted together to the Court for trial, and that they all were found for the plaintiffs.—*Burton* v. *Cochran et al.*, 269

16. Where the general issue and special pleas are filed to the action, and the defence set up in the special pleas is admissible under the general issue, it is immaterial whether a demurrer to the special pleas is sustained or overruled. *Ibid.*

17. Trespass. The first count in the declaration was in the usual form for an assault and battery. The second alleged that the defendant unlawfully, and with inhuman violence, beat, bruised, cut and gashed the face and head of the defendant, &c. Plea, that the several trespasses in the first and second counts mentioned (which were enumerated in the plea) were one and the same, &c.; that the relation of teacher and pupil subsisted between the parties; that at, &c., in school, and during school hours, the plaintiff, as such pupil, was negligent, disorderly, &c., and that the defendant, as such teacher, finding it necessary for the good government of the school, did thereupon moderately correct the plaintiff, as he lawfully might, &c., averring that this moderate correction constituted the several acts of trespass in the declaration mentioned, and in the introductory part of the plea enumerated, &c. *Held*, that the plea was not a good answer to the second count, and the replication to it having been demurred to, that the plea was reached by the demurrer.—*Cooper* v. *McJunkin*, 290

18. A bad replication is sufficient for a bad plea. *Ibid.*

19. Where the particular facts set up in a special plea are admissible in evidence under a general plea filed in the cause, it need not be examined whether a de-

murrer to the former plea was improperly sustained or not.—*Judah* v. *The American Live Stock Insurance Co.*, 333

20. It is unnecessary to examine the validity of a special plea, where all the evidence admissible under it has been admitted under the general issue.—*Stewart et al.* v. *The State*, 396

21. Debt by the marshal of the *U. S.* for the district of *Indiana*, upon the bond of *A.*, a deputy marshal, for his taking insufficient replevin bail upon an execution. Plea, that the bail was, at, &c., a good and sufficient freeholder, and a good, able, and responsible surety, &c. Verification. Replication, concluding to the country. *Held*, that the burden of proof was upon the plaintiff, and that he was entitled to open and close the argument to the jury. —*Hand et al.* v. *Taylor*, 409

22. A plea to the declaration in said case was to the effect following: That the execution-defendants, at the time the writ of execution came to the hands of *A.* as deputy, were, and continued to be, and still were insolvent, and no part of the judgment could be made from their property, on the execution; and that *A.*, in executing the writ, and in taking said *B.* as bail, acted under the general instructions and customary practice of the marshal, in good faith, to take the best bail he could get for the benefit of the execution-plaintiffs, if the bail was reputed good; and that *A.* could not get other or better bail than *B.*, who was reputed good; and that he *bona fide* took *B.* as bail, and returned the bond with the same to the office, without any objection from the marshal or the execution-plaintiffs; and that after the replevin bond was taken and returned, the execution-plaintiffs accepted the same and issued execution thereon; and that the action against the marshal and sureties [for the taking of said bail] was tried and managed in all its parts by the marshal and sureties, a jury was improperly waived by them, and *A.* and his sureties were not notified of the same, and requested or tendered the sole and exclusive management thereof; and after said decision was had against the marshal and sureties, they wholly neglected and refused to take the case, for final decision, to the Supreme Court of the *U. S.*, although requested to do so by *A.* and his sureties. Verification. Special demurrer for duplicity, and the demurrer sustained. *Held*, that the demurrer was correctly sustained, not as a special demurrer for duplicity, but as a general demurrer for insufficiency. *Ibid.*

23. Assumpsit by the payees against the maker of a promissory note given for the balance of the purchase-money of two lots in *A.*, to be liquidated in warehouse commissions from time to time as the payees might call for or demand—said commissions to be in accordance with the regular rates of other established houses in said town of *A.* Averment, that on, &c., at, &c., the plaintiffs called for and demanded of the maker warehouse commissions at the regular rates, &c., and that he refused to pay in warehouse commissions, &c.—pursuing the language of the note. General breach, that the defendant had not paid the money in the note specified, &c. *Held*, that the declaration was bad on general demurrer.—*Worthington* v. *McDonald et al.*, 483

24. Where a special plea is demurred to, but the matter alleged in the plea is admissible under the general issue, which is pleaded, it is immaterial what, or whether any, disposition was made of the demurrer.—*Muirhead* v. *Snyder*, 486

25. Assumpsit against the maker of a note. Plea, the general issue. The declaration described the note as made by *Ephraim S. Muirhead*, and the plaintiff offered in evidence a note signed *E. S. Muirhead*. *Held*, that the note was admissible as conducing to prove the issue on the part of the plaintiff. *Ibid.*

26. Where, by the statute of frauds, it is requisite that a contract sued upon should be in writing, the declaration need not aver that it was so—the provisions of the statute affecting only the rules of evidence, and not those of pleading.—*Bailey* v. *Ricketts et al.*, 488

27. Debt upon a writing obligatory. Plea, that the writing, with three others of like amount, were made by the defendant as the consideration-money of a lot, in, &c., and for no other consideration; that at the time of the purchase and of the execution of the writing obligatory, the plaintiff agreed to convey the lot to him upon the payment of the purchase-money, as specified in said several writings obligatory; that all said notes had been paid except the one sued on, before the commencement of the suit. Averment, that before the commencement of the suit the plaintiff did not convey, nor execute a conveyance or tender it upon full payment of the purchase-money, or on any other condition. *Held*, that the plea was valid in bar of the action.—*Mix* v. *Smith*, 499

28. Action for money had and received. Pleas, payment and the statute of limitations. Replication to the latter plea, that

the cause of action had been concealed, &c. *Held*, that the receipt of the money was admitted. *Held*, also, that the bar of the statute of limitations was admitted, and the question simply presented whether there had been a concealment which would take the case out of the statute.—*Durham* v. *Hudson*, 501

29. Trespass for an assault and battery. Plea, *son assault demesne*. Replication, *de injuria*. *Held*, that the defendant had the right to open and close the evidence and argument to the jury.—*Downey* v. *Day*, 531

30. Declaration in covenant by the obligee against the makers of an agreement under seal, dated *May* 8, 1845, by which the makers promised to pay the obligee 217 dollars and 50 cents, in good farming land in *Tippecanoe* county, or the adjoining counties, or in town lots in *Lafayette*, within two years from date—the lands and lots to be appraised at their fair value by appraisers appointed by the judge of the Probate Court and sheriff of the county for the time being. Breach, that although the time for the payment of said sum, &c., had long since elapsed, yet the defendant had not paid, &c., in the manner specified, or in any other manner. Pleas, 1. That the defendant, on the 8th of *May*, 1847, at, &c., paid to the plaintiffs said 217 dollars and 50 cents in said agreement mentioned, in manner and form as therein specified. Conclusion to the country. 2. That he had at all times, &c., and still held himself in readiness to convey to the plaintiffs a sufficiency of good farming land in *Tippecanoe* county, or the adjoining counties, or town lots in *Lafayette*, fully to pay said sum, but the plaintiffs had never demanded any conveyance, &c. 3. That the plaintiffs had not pointed out or designated to the defendant, or expressed to him a preference for any property to satisfy the agreement. 4. That the plaintiffs had not, at any time, offered the defendant an opportunity to consult with them as to a suitable quantity or quantities, or location or locations, of land to satisfy said agreement, &c. 5. That on the 1st of *July*, 1849, the plaintiffs agreed to receive land in discharge of said agreement, and on that day the defendant offered them a sufficiency of land in *Benton* county (describing it) to satisfy said agreement, and also offered to convey the same to them in satisfaction thereof, and they agreed to receive said lands as a settlement; but afterwards refused without cause, &c. Special demurrer to the first plea, assigning, 1. That the plea alleged performance, without stating the special manner, &c. 2. That it should have concluded to the country. General demurrer to the residue of the pleas. *Held*, that the special causes of demurrer to the first plea were well assigned. *Held*, also, that the other pleas were bad. *Held*, also, that the declaration was not objectionable for not alleging that the plaintiffs had been willing to receive the land; to attend and sanction an appraisement of it, and receive any just award that might be made.—*Ellsworth* v. *Buell et al.*, 555

31. Suit by the assignee against the maker of a promissory note. Pleas, 1. That the note was given for part of the consideration of the purchase of a patent, called, &c., which the seller represented to the defendant would be valuable to him in connection with his trade as a carpenter, and that it was not valuable, &c. 2. That at, &c., it was agreed, &c., that the note should be paid in carpenter work, and that, before the assignment of it, the defendant fully paid the same, according to said agreement. 3. That after the note was executed, it was agreed that the same should be paid in carpenter work, and that, before the assignment thereof, the defendant, in accordance with the terms of said agreement, fully paid and satisfied the same. *Held*, that the first plea was bad; and that the second and third were good, at least upon general demurrer.—*Louden* v. *Birt*, 566

32. In a suit upon a written instrument, a plea which attempts to set up in bar a parol contemporaneous agreement, is bad. *Ibid.*

33. A judgment will not be reversed because an immaterial special plea was not replied to. *Ibid.*

34. Where a plea is substantially defective, a demurrer to the replication to the plea should be overruled.—*Barker* v. *Adams*, 574

35. Action upon a written agreement whereby the defendant agreed to deliver to the plaintiffs a specified quantity of merchantable shelled corn, at *Lafayette*, within a designated period and for a specified price. Plea, that at the time of making the agreement, the plaintiffs agreed in writing with the defendant, that in consideration that the defendant would deliver to them at *Lafayette* said quantity of merchantable shelled corn, they would pay to the defendant said price per bushel, and furnish the defendant a thresher to thresh the corn, for 1 cent a bushel; and

that they failed and refused, on request, to furnish the thresher, whereby the defendant was disabled from performing his contract, &c. *Held*, that the plea was sufficient.—*Bembridge et al.* v. *Stoddard*, 587

36. Proceeding under s. 207, c. 30, R. S. 1843, to establish a claim against an estate. A bill of particulars of the claim was filed in the Probate Court, and the administrator appeared to answer to the claim. A submission in writing was filed, pursuant to the statute, signed by the attorneys of the parties respectively, which, after stating the names of the parties and the venue, *Franklin* county, stated that it was agreed between the plaintiff and the administrator to make an amicable suit of the case, waiving the issuing and service of process and a formal declaration; and to submit the matters in dispute to the Probate Court of said county on the account filed. On this submission there was a trial, and the plaintiffs recovered a judgment. *Held*, that the judgment should not be reversed on the ground that there was a trial without an issue.—*Swift et al.* v. *Hetfield*, 623

37. Where several pleas filed are substantially the same, the Court may, on motion, set aside all but one.—*Hunt et al.* v. *Bailey*, 630

38. A count in case charged that *A.* in an exchange of horses with *B.* falsely represented his, *A.'s*, horse to be sound, when in truth he was not sound, but, at the time of the exchange, was and still is unsound, having a disease called glanders, which *A.* then knew, and that *A.*, though requested, had refused to deliver to *B.* the horse received of him. Plea, that *B.* never delivered or tendered to *A.* the horse received of him in exchange, although *A.*, on, &c., at, &c., tendered back the horse which he got of *B.*; but he then and there refused to receive the horse, &c. *Held*, that the plea was properly rejected on motion.—*Hull* v. *Kirkpatrick*, 637

39. A special plea which merely denies allegations in the declaration which the plaintiff would on the general issue be bound to prove in support of his case, is bad on special demurrer, as amounting to the general issue.—*Payton et al.* v. *Secur et al.*, 645

POSSESSION.

See ADVERSE POSSESSION.

PRACTICE.

See AMENDMENT. ARBITRATION, 4, 12. BILL OF EXCEPTIONS. CHANCERY, 1, 2, 4, 5. CONTINUANCE. DEPOSITION. ESTOPPEL, 1. EVIDENCE, 4, 6, 17. INDICTMENT, 4. INSTRUCTIONS. JURY, 2 to 4. NEW TRIAL, 1, 5, 6, 8, 9. NEXT FRIEND. NUISANCE, 1. PLEADING, 6, 7, 9, 15, 16, 19 to 21, 24, 25, 29, 33, 37. PROMISSORY NOTE, 3. SUMMONS. SUPREME COURT, 1 to 3. VENUE, 2. VERDICT.

1. To authorize a judgment by default in the Probate Court against an administrator, under the R. S. 1843, he must have been served with process at least twenty days before the first day of the term.—*Carter* v. *Spencer*, 78

2. Where the declaration consists of a special and the common count, and the defendant has made default, the common count should be dismissed, or the damages assessed by a jury; otherwise, the judgment will be erroneous. *Ibid.*

3. Where the general issue is in, and special pleas are filed which raise no point of which the defendant could not have availed himself under the general issue, the question whether the Circuit Court improperly set aside the special pleas, is an immaterial one.—*Coe* v. *Smith, Administrator*, 79

4. On a motion for a new trial on the ground that certain facts can be proved by an absent witness, the affidavit of the witness should be produced if it be practicable to obtain it.—*Priddy* v. *Dodd*, 84

5. At the close of the evidence in a cause, the plaintiff's counsel addressed the jury without any restraint as to time. The defendant's counsel having declined to reply, the plaintiff claimed the right to close the argument, which, upon objection being made, the Court refused to permit. *Held*, that in the consumption of time in the argument of causes, much must necessarily be left to the discretion of the judge sitting at the trial, and that discretion not appearing in this case to have been abused, *held*, that the ruling of the Court should not be disturbed. *Ibid.*

6. Where the error assigned is the overruling of a motion for a new trial, no points will be regarded by the Supreme Court as arising in the record, which were not made in the Court below. *Ibid.*

7. Where the admission of evidence has been objected to at the trial, but the grounds of objection do not appear to have been stated, it will be presumed that the evi-

dence was properly admitted.—*Houston* v. *Houston*, 139

8. When the declarations of a party have been admitted at the trial in her own behalf as a part of the *res gestæ*, and the record does not profess to set out all the evidence, but discloses enough to show that if certain other evidence had been offered, the declarations would have been admissible, it will be presumed that such evidence was offered. *Ibid.*

9. After verdict against a defendant indicted for retailing spirituous liquor without license, a motion for a new trial will not be granted because the price for which the liquor was sold was omitted in the indictment.—*Hare* v. *The State*, 241

10. It is not clear that a motion in arrest of judgment would be sustained for that omission. *Ibid.*

11. The motion for a new trial does not go to the indictment. *Ibid.*

12. In the absence of any other specified cause, it is directed to the sufficiency of the evidence. *Ibid.*

13. A party who has moved in arrest of judgment, cannot afterwards move for a new trial.—*Rogers* v. *Maxwell*, 243

14. Same point decided.—*Sherry* v. *Esell*, 652

15. Where the verdict is fully sustained by the evidence, it will not be set aside because an erroneous instruction was given to the jury. *Ibid.*

16. Where the defendant has moved in arrest of judgment, he cannot afterwards take the opinion of the Court on the sufficency of the evidence, on a motion for a new trial, unless he brings himself within some of the recognized exceptions.—*Bepley* v. *The State*, 264

17. Where it seems by a statement in the record that a demurrer was filed and sustained to a pleading, but the demurrer itself does not appear, no question can arise upon it on error.—*The Rushville, &c., Railroad Co.* v. *McManus*, 275

18. It is competent for the Circuit Court to which a change of venue has been granted, to change the venue back, upon a proper application, to the same Court that granted it.—*Clark* v. *The State*, 268

19. A party by consenting to a change of venue and appearing to the action in the Court to which it is removed, waives his right to complain of any irregularity in the manner of the change. *Ibid.*

20. A cause was continued by the Circuit Court until the next term, which was then fixed by law for *October*, but before *October* the legislature dispensed with or postponed the term until the spring thereafter. *Held*, that the cause was not discontinued. *Ibid.*

21. An appearance after verdict waives a discontinuance. *Ibid.*

22. Bill under art. 3, c. 30, R. S. 1843, to contest the validity and prevent the probate of a writing offered to be proved as a will. An issue was made up in the form prescribed by s. 60 of said article, except that the words, "the execution of the same being admitted," were added. *Held*, that the defendants still had the right to open and close the argument to the jury. *Held*, also, that the defendants, by allowing the plaintiffs, as they did, to introduce their evidence first before the jury, did not waive that right.—*Perry et al.* v. *Bland et al.*, 297

23. Where, without reference to improper evidence admitted, the proof sustains the finding of the Court, the judgment will not be reversed.—*Bowers* v. *Headen*, 318

24. Trespass against six defendants. The writ was served on three of them, and as to the others, was returned "not found," but the return was not suggested upon the record. After the plaintiff had closed his testimony, the defendants served with process introduced the defendants not served, and proposed to swear them as witnesses. The plaintiff objected, and while the objection was under discussion, caused another writ to be issued in the cause, and to be served on the defendants who had not been served. *Held*, that, as to the defendants on whom the process had not been served before the commencement of the trial, the writ had abated, and they were no longer parties to the action. *Held*, also, that they were competent witnesses.—*Conwell et al.* v. *Smith*, 359

25. When the writ was returned "not found" as to a portion of the defendants, two courses were, under the R. S. 1843, open to the plaintiff: he might continue the cause till all the defendants were brought into Court, or suggest the return of "not found" upon the record, and proceed to trial against those served. *Ibid.*

26. If the plaintiff adopted the latter course, he might afterward proceed by action against those "not found," jointly or severally. *Ibid.*

27. The declaration in a suit brought by a foreign administrator, need not, under the

R. S. 1843, state that the plaintiff produces and files, &c., a copy of his letters, &c. —*Jelly* v. *Stevens*, 510

28. The statute requiring the production and filing, &c., by such administrator, of a copy of his letters, applies only to the rules of evidence, and not to those of pleading. *Ibid.*

29. Suit upon a note payable nine months after date. Averment, that "although said sum of money has been long since due and payable," yet, &c. *Held*, that it sufficiently appeared that nine months had elapsed from the date of the note. *Ibid.*

30. In a suit by an administrator upon a promissory note given to the intestate, a breach in the declaration that the same is wholly due and unpaid, is a sufficient denial of its payment to the intestate. *Ibid.*

31. A motion was made in the Circuit Court, prior to the act of 1851, to suppress depositions, and overruled; but the objection relied upon was not shown by the record. *Held*, that it must be presumed that no objection was pointed out, and, hence, that the ruling of the Court was right.—*Hussey* v. *McGilpin*, 593

PRESCRIPTION.

See NUISANCE, 6.

PRINCIPAL AND AGENT.

See CHANCERY, 5. PROMISSORY NOTE, 1. VENDOR AND PURCHASER, 1.

Proceeding by a surety against his principal, under c. 51, R. S. 1843, by notice and motion. The notice recited the recovery of judgment by *A.* against *B.*, as principal, and *C.* as surety, in the *Union* Circuit Court, the payment of the judgment by *C.*, and the notice given by the surety to the principal to show cause, &c. *Held*, that the statute had been substantially pursued.—*Bragg* v. *Cason*, 632

PRINTER.

See STATE PRINTER.

PRINTING.

See STATE PRINTER.

PROBATE COURT.

See EXECUTORS AND ADMINISTRATORS, 2, 3. PLEADING, 36.

The Probate Court had authority, under the R. S. 1843, and it was its duty upon a proper application, to grant a change of venue in proceedings under art. 3, c. 30, of those statutes, to contest the validity of a will.—*Rogers et al.* v. *Howard et al.*, 325

PROCESS.

See PRACTICE, 22 to 24. SUMMONS.

PROMISSORY NOTE.

See INDICTMENT, 5. MORTGAGE, 5 to 7. PARTIES, 2. PLEADING, 2, 8, 10, 14, 23, 27, 30, 31. SET-OFF, 1. SUNDAY. USURY, 2, 4. VENDOR AND PURCHASER, 1.

1. When an agent takes a note in his own name for a debt due to his principal, and assigns the note to the latter, the maker cannot set up as a defence to a suit by the latter upon the note, that when it was made the agent was not authorized to take it in his own name.—*Palmer* v. *Egbert*, 65

2. By agreement between the maker and payee of a promissory note, after its execution, the payee was to receive lumber in satisfaction of the note; and the maker, before the note became due, had substantially performed his part of the agreement. *Held*, that such performance was a sufficient defence in a suit against the maker by an assignee to whom the note had been indorsed after it became due.—*Ward* v. *Walton*, 75

3. The assignee of a joint promissory note who had sued the makers, might, under the R. S. 1843, upon the service of the summons upon one and a return of "not found" as to the other, suggest such return, obtain a judgment against the maker served, and afterward sue the other maker upon the note.—*Hunt* v. *Adamson*, 108

4. *A.* executed to *B.* a note payable at a day specified, in money or wheat at the customary prices at *F.*, &c. *Held*, that a demand of the wheat was not necessary before suit. *Held*, also, that the wheat was to be delivered at *F.*—*Harbor* v. *Morgan*, 158

5. A party who has been sued upon his notes, and trusting to the assurances of the plaintiff that payments made thereon had been properly credited, has suffered judgment to pass for the full amount, without examining the notes, is not in a condition to obtain relief in chancery.—*Jarboe* v. *Kepler*, 177

6. A note payable to the payee or bearer, unless payable at a chartered bank within this state, can only be transferred, under the R. S. 1843, by indorsement.—*Jamison* v. *Jarrett*, 187

7. In a suit upon a promissory note, where the defence is a failure of the consideration, and the evidence at the trial is about equally balanced, the plaintiff must recover the amount of the note—the burden of impeaching the consideration being upon the defendant.—*Cook* v. *Noble*, 221

8. The Court, sitting as a jury, having found a verdict for the defendant upon such evidence, the Supreme Court set aside the verdict and remanded the cause for a new trial. *Ibid.*

9. Suit before a justice, under the R. S. 1843, upon a note without date, payable in terms two years after date, and, if not paid at maturity, then to be due in twelve months afterwards, at 6 per cent. from a preceding specified period. The defendant appeared before the justice, and, the transcript recites, filed his plea as the law directed, wherein it appeared that the title to real estate would come in question and be put in issue on the trial; whereupon the justice certified the cause to the Circuit Court. The defendant having failed to appear in the Circuit Court, a judgment by default was rendered against him, without an inquest of damages by the jury. *Held*, that the transcript showed, *prima facie*, that the cause was properly transferred to the Circuit Court. But, *held*, that the general issue being in, by virtue of the statute, and extrinsic evidence being necessary to prove the date of the note, a jury should have been impanneled to try the cause, as if the defendant had appeared and defended the action.—*Love* v. *Bohan*, 235

10. A promissory note was made payable, in terms, without the benefit of the stay of execution. Suit was brought upon the note, and the Court rendered judgment for the plaintiff, and that the defendant should have no stay of execution. *Held*, that so much of the judgment as prohibited the stay of execution was erroneous.—*McLane et al.* v. *Elmer*, 239

11. A promissory note payable in property, under the R.S 1843, imports, *prima facie*, a valuable consideration.—*Rogers* v. *Maxwell*, 243

12. A declaration upon such a note need not allege the consideration. *Ibid.*

13. A note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against a co-administrator, unless accompanied by proof of an original indebtedness upon which the note was founded; and, when such proof is made, the note becomes only *prima facie* evidence, liable to be disputed on any ground which would have been valid as against such original indebtedness.—*Weston* v. *Murnan, Administrator*, 271

14. In a suit for foreclosure by the assignee of a mortgage, against *A.*, for the non-payment of his note given to *B.* and secured by the mortgage, *A.* set up in his answer that before notice of the assignment he sold certain specified goods to *B.* and *C.* to whom the note actually belonged, although drawn in favor of *B.*, and that by an agreement with *B.* and *C.*, and particularly with the consent and acquiescence of *B.*, the goods were accepted for and on account of said note. *Held*, that the defence alleged was sufficient.—*Reed et al.* v. *Coale et. al.*, 283

15. The surrender of a note to the maker is a good consideration, to the extent of the amount due on it, for a new note given in its stead. *Ibid.*

16. The new note is a new contract, to be regarded as if given for any other valid consideration, and to be governed in all respects by the law in force at the date of its execution. *Ibid.*

17. Where the assignor of a note fills up the assignment with the name of the assignee, he thereby designates the person to whom he is liable.—*Bowers* v. *Headen*, 318

18. But where he merely writes his name upon it, he agrees that the blank may be filled up by any *bona fide* holder, that the person whose name is filled in shall be his immediate indorsee, and that he will be liable to him as such. *Ibid.*

19. Where the indorsement remains blank, the note may be passed by mere delivery. *Ibid.*

20. These rules prevail in the assignment of notes under the R. S. 1843, as well as in assignments under the law-merchant. *Ibid.*

21. Where there are intermediate full indorsements, the indorsee cannot, in his own name, sue a remote indorser at law. *Ibid.*

22. Under the R. S. 1843, a promissory note in the form of a due bill, is negotiable. *Ibid.*

23. Such a note when sold may be indorsed in full or in blank. *Ibid.*

24. In a suit upon the assignment of a promissory note indorsed in blank, evidence that when it was indorsed the assignor told the person to whom it was delivered, *that he need not sue the maker, as he was poor—that he, the assignor, would see it paid*, is not admissible. *Ibid.*

25. A creditor who receives the notes of third persons, properly indorsed to him, as collateral security for a debt, knowing the makers to be in doubtful circumstances, is bound to use reasonable diligence to collect them, or show some excuse for not doing so, but extraordinary diligence is not required.—*Slevin et al.* v. *Morrow et al.*, 425

26. If the creditor, through his laches, fails to realize the money on the notes, the debtor has the right to treat the notes as a satisfaction, so far as they go, of the debt. *Ibid.*

27. The R. S. 1831 permitted the payee of a note to proceed at law on the note and in chancery on a mortgage given to secure it, at the same time; but a satisfaction of either the decree or judgment was a satisfaction of both.—*Fairman* v. *Farmer et al.*, 436

28. *A.* and *B.* having mutual accounts between them, *B.* died, and *C.* was appointed his administrator. *C*, afterwards, as administrator, executed to *A.* a note payable out of *B.'s* estate. *Held*, that the note was *prima facie* evidence of a settlement of the mutual accounts, and of the amount found due on the settlement.—*Phelps* v. *Younger*, 450

29. To impeach a note founded upon the settlement of mutual accounts, it is necessary to show some mistake or fraud in the settlement. *Ibid.*

30. Possession of a promissory note, not indorsed, is *prima facie* evidence of ownership, and *prima facie* entitles the possessor to payment.—*Bush* v. *Seaton et al.*, 522

31. Where the payee of a note, having transferred it to another person by delivery, afterwards receives payment of the note, the equitable owner may recover from him the money, in an action for money had and received. *Ibid.*

32. The amount paid to discharge an incumbrance upon land conveyed with a warranty against incumbrances, may, if reasonable, and the least for which the incumbrance could be bought in, be set up as a defence (in the absence of any other controlling agreement between the grantor and grantee) by way of recoupment, to a suit by the assignee or payee of a note given for the last instalment, at least, of the purchase-money.—*Baker* v. *Railsback*, 533

33. The consideration of a note may be proved by a conversation between the parties when it was given.—*Orth et al.* v. *Sharkey*, 642

34. A promissory note was executed and put into the hands of *A.*, to be delivered to the payees upon their surrendering up a letter of credit which they held to secure the debt of a third person. *A.* delivered up the note to the payees without receiving from them the letter of credit, and, having never surrendered it, they brought suit on the note. *Held*, that the note was void for want of consideration.—*Payton et al.* v. *Secur et al.*, 645

PROSECUTING ATTORNEY.

1. The prosecuting attorney of the fourth judicial circuit, who was elected under a law of 1849, (Laws 1849, p. 95), was entitled to serve during the full period of the term for which he was elected, notwithstanding the election, before the expiration of his said term, of a prosecuting attorney for that circuit, under the act of 1851, (Laws 1851, p. 141).—*Barnwell* v. *The State ex rel. Robinson*, 179

2. Chapter 132 of the acts of 1851 repealed c. 13 of the acts of 1847, and revived c. 73 of the R. S. 1843.—*The State* v. *Shufflebarger*, 532

3. The last-named chapter having provided that prosecuting attorneys should receive the same compensation as was then provided by law, their compensation was to be regulated by s. 1, c. 40, R. S. 1838. *Ibid.*

PURCHASE-MONEY, APPLICATION OF.

See SHERIFF'S SALE, 5, 6.

R.

RAILROAD COMPANY.

See DAMAGES, 2.

RECOGNIZANCE.

1. The fact that a party recognized for a crime by a justice of the peace has been subsequently recognized by the same justice upon another charge, for a matter which was part of the same transaction, will not discharge the first recognizance.—*The State* v. *Shaw*, 428

2. Where a complaint made before a justice of the peace shows that the act charged

might be either of several crimes, the justice may elect for which he will recognize the party, and a recognizance to appear and answer for either will be valid. *Ibid.*

3. An examining magistrate could require two or more persons to enter into a joint recognizance to appear and answer to an indictment for murder, when the law authorized a joint trial of persons charged with being jointly concerned in the commission of that crime.—*Holtzclaw* v. *The State*, 597

RECORD.

See JUDGMENT, 4. NOTICE.

RECORDING.

See REGISTRY.

RECOUPMENT.

See PROMISSORY NOTE, 32. REMEDY, 3.

REFERENCE.

See ARBITRATION, 11, 12.

REGISTRY.

See MORTGAGE, 8, 9. PATENT.

The recording of an instrument operates as constructive notice of its contents only in those cases where the recording is authorised by law.—*Reed et al.* v. *Coale et al.*, 283

RELATOR.

1. In a suit upon a surplus revenue bond the board of county commissioners is a proper relator.—*The State* v. *Clark et al.*, 315

2. It is doubtful whether in a suit upon a surplus revenue bond, any relator is necessary; though a responsible relator might be proper. *Ibid.*

RELEASE.

See DOWER, 2. WITNESS, 7, 9.

1. The release of a parol contract need not be under seal.—*Devolin* v. *Riggobee*, 464

2. A female over eighteen and under twenty-one years of age, may, in this state, make a valid release of a contract to marry. *Ibid.*

3. A release of real estate is not valid unless a grantee is in some way designated.—*Nooseman et al.* v. *Nooseman*, 648

REMEDY.

See AMENDMENT. ASSUMPSIT.

1. Where private property is taken for public use under the authority of a statute which points out the mode in which compensation shall be made therefor, that mode, and no other, under the constitution of 1816, could be pursued to obtain such compensation.—*Null et al.* v. *The White Water, &c., Canal Co.*, 431

2. The reason of this rule is, that as the law authorized the property to be taken, the corporation appropriating it committed no wrongful act, and hence the common-law doctrine as to cumulative remedies is not applicable. *Ibid.*

3. A defendant may elect between claiming a set-off or recoupment in an action brought against him, and bringing a cross action for his demand.—*Rankin* v. *Harper*, 585

4. If he elects to bring the cross action, he is bound by that election, at least till he abandons it by dismissing his suit. *Ibid.*

RENTS AND PROFITS.

See SHERIFF'S SALE, 2.

REPLEVIN.

1. When a partner sells to a stranger his interest in the partnership goods, the stranger cannot, on refusal of the co-partner on demand to admit him as a partner, maintain replevin for the goods.—*Reece* v. *Hoyt*, 169

2. In replevin, only compensatory damages can be given.—*Hotchkiss et al.* v. *Jones*, 260

3. In replevin, where no damages are alleged, the amount of the recovery cannot exceed the alleged value of the property. *Ibid.*

REPLEVIN BAIL.

See JUDGMENT, 12, 13.

1. The R. S. 1838 did not give to the undertaking of a replevin-bail in a justice's Court the force of a judgment, but merely that of an obligation to pay the judgment, if it could not be made by an execution against the principal.—*Burton* v. *McGregor et al.*, 550

2. A joint execution could not, under the R. S. 1838, be issued by a justice of the peace against a judgment-debtor and his replevin-bail. *Ibid.*

3. Before the plaintiff could proceed by *scire facias*, under the R. S. 1838, against a replevin-bail, before a justice of the peace, it was incumbent upon him to have an execution against the principal returned "no property found," &c. *Ibid.*

4. A party prosecuting a *scire facias* against a replevin-bail upon an alleged revived judgment against the principal, may be required to show that the judgment has been revived. *Ibid.*

5. In *October*, 1838, *A.* became replevin-bail upon a justice's judgment. In a proceeding by *scire facias*, in 1849, for an execution against the bail, he pleaded the statute of limitations. *Held*, that the plea was properly rejected. *Ibid.*

RESCISSION.

See PLEADING, 2, 33.

A party who would rescind a contract on the ground of fraud, must return whatever of value he has received upon the contract from the opposite party, that they may be placed in *statu quo*.—*Cooley* v. *Harper*, 454

RETAILING.

See BOARD OF COMMISSIONERS, 2 to 5. CONSTITUTIONAL LAW, 12, 15. INDICTMENT, 1, 7 to 9, 15. INFORMATION, 1, 2, 4, 6 to 10. NUISANCE, 1. STATUTES, 12, 13.

1. Prosecution under the act of *March*, 1853, for retailing spirituous liquor without license. The defendant admitted the selling without license as charged. *Held*, that the question of the power of the legislature to prohibit the sale of spirituous liquor was not involved in the cause. *Held*, also, that the defendant's admissions were sufficient to authorize a conviction, if the law was constitutional.—*Maine* v. *The State*, 349

2. On the trial of the defendant for retailing, he offered in evidence the record of a former conviction for retailing, as evidence of a conviction for the same offence, but the evidence given at that trial was not set out in that record. The prosecuting witness testified that he had bought liquor from the defendant by a less quantity than a quart several times, but that he did not know and could not distinctly recollect that the time to which he then testified was any other or different from the time testified to by him in the said case in which the defendant had been convicted; but he further stated that the place where the liquor was sold was supplied with suitable bottles, liquors and fixtures for a bar; and that about the time of the selling in question, for a period of four weeks, he had drank at that bar habitually, some days as often as three or four times a day. *Held*, that the jury were authorized to infer that the offence charged was different from that on which he had before been convicted.—*Willard* v. *The State*, 407

3. The act to regulate the retailing of spirituous liquors, &c., approved *March* 4, 1853, does not prescribe any penalty for selling spirituous liquors on *Sunday*.—*Rosenbaum* v. *The State*, 599

4. Information under the liquor act of 1853, for retailing spirituous liquor. The retailing was charged and proved to have taken place on the 4th of *June*, 1853. The defendant produced a license regularly issued by the auditor, dated *November* 7, 1852, authorizing him to retail spirituous liquor for one year, and proved that at the *April* election, 1852, a majority of the votes in the township for which the license issued, and where the retailing took place, were cast in favor of granting license. *Held*, that the license covered the period when the retailing took place, and was valid.—*Lemon* v. *The State*, 603

5. To authorize the issuing of process under s. 3, p. 385, R. S. 1852, for the apprehension of a person accused of retailing spirituous liquor without license, the testimony should show the name of the person to whom the liquor was sold, or that his name is unknown.—*The State* v. *Burgess*, 606

RETURN.

The return upon a *fi. fa.* that it was levied "upon the property of" the execution-defendant, without designating the kind, quantity, or value, and accompanied by no other paper or memorandum to remove the uncertainty, is void for uncertainty.—*Law et al.* v. *Smith et al.*, 56

REVISED STATUTES.

See STATUTES, 14 to 17, 20, 24.

RIOT.

1. Where, by previous concert, three or more persons, by their voices or a trumpet,

make a great noise tumultuously, in the night-time, in the vicinity and within the hearing of persons not participating with them, the act, under the R. S. 1843, is a riot.—*Bankus* v. *The State*, 114

2. The fact that the witnesses who heard the noise were not alarmed by it, does not change the nature of the offence. *Ibid.*

3. Neither does the circumstance that those who made the noise were in a good humor at the time. *Ibid.*

S.

SALE.

See ADMINISTRATOR'S SALE, 1 to 4. MORTGAGE, 2 to 4. STATE PRINTER, 4, 5. VENDOR AND PURCHASER.

1. Growing crops raised annually by labor, are subject to sale as personal property, even before their maturity, and the sale does not necessarily involve an interest in realty requiring a written agreement.—*Bricker* v. *Hughes*, 146

2. A sale of personal property is not complete, where something yet remains to be done by the seller before the article sold can be identified. *Ibid.*

3. By the common law, a parol contract for the sale of chattels is valid; and the statute of frauds changes that rule only as to sales amounting to more than fifty dollars.—*Henline* v. *Hall*, 189

4. *A.* sold a colt to *B.*, by parol, for twenty dollars, the parties agreeing that the colt should run with the mare, which belonged to *A.* and was in his possession, until it was weaned, when it should be delivered to *B.*, who was then to pay the price stipulated. When the colt was weaned, *B.* tendered the twenty dollars, in specie, and demanded the colt. *Held*, that the contract vested the property in *B.*, and placed it at his risk, from the moment when the bargain was closed, without any actual payment or present delivery; and that *A.*, from the time when the contract was made until the delivery of the colt to *B.*, was a bailee. *Ibid.*

SATISFACTION.

See ACCORD AND SATISFACTION. JUDGMENT, 10. PROMISSORY NOTE, 26, 27.

SCHOOLMASTER.

See PLEADING, 17.

1. A teacher, in the exercise of the power of corporal punishment, must not make such power a pretext for cruelty and oppression, but the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, should be distinguished with the kindness, prudence, and propriety which become the station.—*Cooper* v. *McJunkin*, 290

2. The doctrine laid down in *Cooper* v. *McJunkin*, *ante*, p. 290, in relation to the right of teachers to chastise their pupils, adhered to.—*Gardner* v. *The State*, 632

3. As a matter of public policy and to prevent breaches of the peace, courts should hold a strong and stern hand over teachers who abuse their sacred and responsible position by the infliction of brutal corporal punishments. *Ibid.*

SCHOOLS.

1. Trustees of a school district, appointed by the township clerk, held their office, under the R. S. 1843, until their successors were elected and qualified.—*Swails* v. *The State*, 516

2. *A.* was elected, at the regular election in 1849, a district trustee, under s. 39 of the act of 1849 to increase and extend the benefits of common schools. No election was held in 1850. *Held*, that *A.* was thereby continued in office, and that an appointment by the township clerk of another person in his stead, under the act of 1850, amendatory of said section, was void.—*Stewart et al.* v. *The State*, 396

3. School districts, being public corporations, organized under a public statute, the courts will judicially take notice of their organization.—*Swails* v. *The State*, 516

SCIRE FACIAS.

See JUDGMENT, 2. JURISDICTION. PLEADING, 7. REPLEVIN BAIL, 3 to 5.

1. *Scire facias*, under the R. S. 1843, on the transcript of a justice's judgment, for an execution against real estate. The *scire facias* alleged that *A.*, *B.*, and *C.*, merchants trading under the name of *A. & Co.*, recovered a judgment under their firm name, &c. Pleas, 1. That *A.*, *B.* and *C.* were not, at the time of the recovery of judgment, nor at any other time, partners under the name of *A. & Co.*, nor did they, as partners, or otherwise, recover the judgment, &c.—2. That *A.*, *B.*, and *C.*

were not, at the commencement of the suit, nor are they yet, the owners of the judgment as partners under the name of *A. & Co.*, or otherwise. The pleas, not having been sworn to, were, on motion, rejected. *Held*, that the rejection was right.—*Forbes* v. *Tiffany et al.*, 204

2. Where the judgment has been assigned, such *scire facias* may be prosecuted, under the R. S. 1843, in the name of the judgment-plaintiff. *Ibid.*

3. The defendant cannot, in such case, complain of the omission of the clerk to indorse upon the writ that it is for the use of the assignee. *Ibid.*

4. A proceeding by *scire facias* to revive a judgment, is a suit in which the defendant is entitled to notice, and to appear and plead, and to have a trial of the issues.—*Burton* v. *McGregor et al.*, 550

5. Such proceeding falls within the cases in which the statute fixes a time within which a justice shall render judgment. *Ibid.*

6. The failure of the justice to enter such judgment within the period required by the statute, works a discontinuance of the suit. *Ibid.*

7. The justice cannot afterwards amend by entering up the judgment as of a period within that fixed by the statute. *Ibid.*

SEDUCTION.

A conveyance of land to a husband in satisfaction of a demand for damages against the grantor for the seduction of his wife, is valid against the creditors of the grantor, where there appears to have been no fraud on the part of the husband.—*Carlisle et al.* v. *Geskill et al.*, 219

SET-OFF.

See Attorney at Law, 4. Remedy, 3.

In a suit upon a note executed by *A.* to *B.*, a note made by *B.* and *C.* to *A.* was set up as a defence by way of set-off, without any allegation applying the latter note to the transaction upon which the former was founded. *Held*, that it was not a proper set-off.—*Reed et al.* v. *Coale et al., Administrators*, 283

SHERIFF.

See Witness, 1.

1. A sheriff, when he accepts the office, contracts that he will faithfully discharge every duty required of him by law, and for the omission of any duty enjoined by law, from which damages follow, he will be held responsible.—*The State* v. *Lines*, 351

2. The steps to be taken by a sheriff, on the sale of real estate upon execution, are distinctly pointed out, and for a failure to pursue them, whether from a corrupt intention or neglect, he is liable to the injured party. *Ibid.*

3. It is the duty of the sheriff, on a sale of land upon execution, to make and tender a deed to the purchaser, and the latter is not bound to part with his money until the deed is tendered. *Ibid.*

4. Where the sheriff not having tendered a deed to the purchaser, has, for an omission of the latter to pay the purchase-money, sold the land for a smaller sum to another person, the first purchaser is released from his bid, and is not liable to pay the difference between the first and second sales. *Ibid.*

5. The sheriff, under such circumstances, is liable to the execution-defendant for the amount of the difference between the two sales. *Ibid.*

6. The infringement by the sheriff of a positive law, while acting in his official capacity, is such a violation of his duty as amounts to a breach of his bond.—*The State* v. *Williams*, 393

7. Indictment against a sheriff, predicated upon s. 5, c. 104, acts 1841, which was revived and continued in force by an act of 1844. The indictment, after setting out a decree, &c., in favor of, &c., and against the unknown heirs of one *A.*, the issuing of an execution and the levy thereof on a certain tract of land, charged that the sheriff, while acting as such, during the sale of said land, unlawfully and knowingly did, &c., procure one *B.* to bid off and buy said land at said sale for the use and benefit of him, the sheriff, and that *B.* did then, &c., bid off and buy the land for the sheriff, with the intention then and there to cheat and defraud said unknown heirs, &c., in the sum of, &c. The sale was alleged to have been made on the 18th of *May*, 1850, and the indictment was found at the *April* term, 1852. *Held*, that the section of the act upon which the indictment was founded, created two distinct offences; one for being knowingly guilty of an act or omission amounting to a breach of his official bond, which is punished by fine; the other for being guilty as aforesaid, with intent to defraud or injure any person, &c., which is punished by fine and imprisonment; and that the first offence

was well described, but the latter was not. But, *held*, that the prosecution for the first offence was barred by the statute of limitations. *Ibid.*

8. By the R. S. 1852, sheriffs are entitled to mileage for taking a convict to the state prison, for each mile they may necessarily travel in going to and returning therefrom. —*Dunn* v. *The State*, 529

9. The provisions of s. 1, c. 37, R. S. 1852, vol. 1, and s. 1, c. 70, of the same volume, regulating sheriffs' fees for taking convicts to the state prison, are not repugnant to each other, and are to be construed in *pari materia*. *Ibid.*

SHERIFF'S SALE.

See CERTIFICATE FOR CANAL LAND, 2. INADEQUACY OF PRICE. NOTICE. SHERIFF, 2 to 5. SPECIFIC PERFORMANCE, 1.

1. A sale of real estate upon execution, without appraisement, is proper, if at the date of the contract upon which the judgment was rendered, the law did not require that lands to be sold on execution should first be appraised.—*Law et al.* v. *Smith et al.*, 56

2. Where it does not appear that the rents and profits of land were not first offered upon a sale on execution, it will be presumed that they were first offered. *Ibid.*

3. Great inadequacy of price will not vitiate a sale of land upon execution, where the inadequacy has been occasioned by the improper conduct of the execution-defendant. *Ibid.*

4. Gross inadequacy of price is not sufficient to set aside a judicial sale; but such inadequacy may be a controlling element, in connection with other circumstances, in determining its validity.—*Benton* v. *Shreeve et al.*, 66

5. A sheriff who, having several executions in his hands upon decrees of foreclosure against the same land, sells the land upon the execution having the preference, for a sum more than sufficient to satisfy it, should apply the surplus upon the other executions, according to the order of their preference. *Ibid.*

6. The fact that the purchaser under the first execution has not fully paid the purchase-money, does not authorise the sheriff to sell upon the execution next having preference. His act in accepting a part of the purchase-money, obliges him to take the proper steps to coerce payment of the residue. *Ibid.*

SLANDER.

In slander for words charging the plaintiff with perjury in his testimony given at a trial, it is a sufficient defence to show that the plaintiff was not sworn at the trial.—*Snyder* v. *Degant*, 578

SPECIFIC PERFORMANCE.

1. To entitle a person to a specific performance of a sheriff's sale—if the sale can be at all enforced in equity—he must have filed his bill within a reasonable time, paid, or offered to pay, the purchase-money, and, in case of an offer, have followed up the tender by bringing the money into Court.—*Benton* v. *Shreve et al.*, 66

2. Courts of law, as a general rule, do not enforce the specific performance of agreements unless specially authorised to do so by statute; but award damages for the breach of them.—*McLane et al.* v. *Elmer*, 239

3. *A.* being the owner of a tract of land under mortgage, agreed, by title bonds, to convey a part of it to *B.* and the residue to *C.*, with the agreement that *C.*, with the consent of the mortgagee, might apply the purchase-money to the discharge of the mortgage on his part. The mortgagee having assented, *B.*, with the fraudulent purpose of getting his part of the land also released from the mortgage, as a part of the land purchased by *C.*, arranged with *A.* and *C.* that *A.* should convey the entire tract to *C.*, that *C.*, upon paying the purchase-money for his part of the premises, should fraudulently procure a release by the mortgagee of the whole of the premises, and then convey to *B.* the part of the premises which *A.* had agreed to convey to him. *C.* having fraudulently procured the release of the whole premises upon the payment to the mortgagee of the purchase-money for his part, and having refused to convey to *B.* as he had agreed, *B.* filed his bill for a specific performance. *Held*, that the bill would not lie.—*Kitchen et ux.* v. *Cofyn*, 504

SPIRITUOUS LIQUOR.

See CONSTITUTIONAL LAW, 12 to 15. INDICTMENT, 1, 7, 8, 15. INFORMATION, 1, 2, 4, 6 to 10. NUISANCE, 1. STATUTES, 12, 13.

STATE PRINTER.

1. It is competent for the legislature to make the state printer an officer.—*Ellis et al.* v. *The State et al.*, 1

2. The law of 1843 made the right to do the state printing and take the compensation therefor, an office. *Ibid.*

3. The office of state printer is one of trust and profit. *Ibid.*

4. The sale of the office of state printer is prohibited by principles of public policy. *Ibid.*

5. The act of 1851, entitled "An act in relation to the pay of *Austin H. Brown*, printer to the constitutional convention of *Indiana*," does not sanction the assignment of the office of state printer made by *Jacob P. Chapman*, state printer, to *Ellis* and *Spann*. *Ibid.*

6. The printing done for the constitutional convention of 1850, was not embraced in any contract, express or implied, between the state printer and the legislature that elected him. *Ibid.*

7. No contract could be implied, on the part of the legislature, with the state printer, further than that he should execute the printing authorized by a legislature acting under the same constitution with that which elected him. *Ibid.*

8. By public printing is meant that which is directly ordered by the legislature, or performed for the agents of the state government authorised to procure it to be done. *Ibid.*

9. The printing executed by *Austin H. Brown* for the constitutional convention of 1850, was not authorized by a legislature acting under the constitution of 1816, nor by any legislature; nor did any authorized agent of the legislature procure it to be done. *Ibid.*

10. The printing done for the constitutional convention of 1850, was procured by the convention to be done on its own responsibility; and the subsequent payment for it by a legislature sitting under the authority of the constitution of 1851, was a voluntary and not an obligatory act; and the state was not rendered liable for damages to the state printer thereby. *Ibid.*

STATE PRINTING.

See STATE PRINTER.

STATUTE OF FRAUDS.

See PLEADING, 26. SALE, 4.

1. By the common law, a parol contract for the sale of chattels is valid; and the statute of frauds changes that rule only as to sales amounting to more than 50 dollars. —*Menline* v. *Hall*, 189

2. An agreement to lease land for the term of two years, at a rent equal to the full rental value of the premises, the occupation to commence at a future day, is an agreement relating to an interest in land, and under s. 16, c. 28, R. S. 1843, and notwithstanding the exception in that section relating to leases not exceeding the term of three years, to be valid, it must be in writing.—*Stackberger* v. *Mosteller*, 461

3. A suit will not lie upon an oral agreement for such a lease on account of the refusal of the lessee to deliver possession of the premises at the time appointed. *Ibid.*

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES.

See ADMINISTRATOR'S SALE, 3, 4. BOARD OF COMMISSIONERS, 3 to 5. CONSTITUTIONAL LAW, 12 to 15, 17. IMPRISONMENT FOR DEBT. JUDGMENT, 7. MISDEMEANOR. PROSECUTING ATTORNEY. RETAILING, 3, 5. SHERIFF, 7, 8, 9. STAY OF EXECUTION. SUMMONS, 1, 2. SUNDAY. TAXES, 1, 2, 6. USURY, 3.

1. The act of 1848 authorising a reference of the claim of *Patrick McGinley* against the state to three disinterested persons, to be appointed by the governor, enacted that two of such persons should be men of legal attainments, &c. *Held*, that the act was merely directory to the governor, and that his action in the premises could not be reviewed.—*The State* v. *McGinley*, 7

2. That act made it the duty of the Supreme Court, on an appeal from the award of the arbitrators, to examine the case upon its merits. *Ibid.*

3. The legislature, by authorising an appeal to the Supreme Court from the award of the arbitrators, intended that said Court should be governed by the rules of law applicable to ordinary suits. *Ibid.*

4. A member of the board of public works could not, under the internal improvement act of 1836, approve or disapprove of a contractor's work. *Ibid.*

5. The statute which exempts persons or property from taxation, is to be construed strictly.—*Orr* v. *Baker*, 86

6. The statute which exempts from taxation the lands whereupon every building

erected for religious worship is situate, not exceeding ten acres, was not intended to include any part of the land which is diverted to secular uses for gain. *Ibid.*

7. When a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute.—*Bargis* v. *The State*, 126

8. An act of 1849 conferred upon justices of the peace in certain counties, exclusive jurisdiction over certain offences, and enacted that they should, "on complaint under oath, or on view, take jurisdiction of all such offences." *Held*, that the justice could not render a judgment against an offender upon confession of any such offence, except on such complaint or on view. *Ibid.*

9. The statute creating the *Centreville and Abington Turnpike Company*, provided that, for the purpose of determining the damages to be allowed for land taken for the use of the company, each party might select one disinterested freeholder of the county, and give notice to the other party to select another, to act as arbitrators. *Held*, that the claim filed need not show that the arbitrator selected by the claimant was a disinterested freeholder.—*The Centreville, &c., Turnpike Co.* v. *Jarrett et al.*, 213

10. Whether a law is politic or expedient or necessary, is not a question with which the courts have anything to do.—*Bepley* v. *The State*, 264

11. The term "land-office certificate of purchase," as used in s. 8, c. 29, R. S. 1843, applies to certificates from the *U. S.* land-offices; and the term "land-office receipts of final payment," as used in that section, relates to our system of canal lands, *Michigan* road lands, and others sold on credit.—*Dickerson* v. *Nelson et al.*, 280

12. The act of 1851 to regulate the sale of spirituous liquors in *Tippecanoe* county, was not repealed by the new constitution.—*The State* v. *O'Conner*, 299

13. Section 7 of that act does not create a distinct offence from that created by section 5 of the same act, but only prescribes a new rule of evidence upon trials for the offence defined by the latter section. *Ibid.*

14. The R. S. 1852 did not take effect until they were distributed to all the counties in the state.—*Jones* v. *Cavins*, 305

15. They were not distributed to all the counties until the 6th day of *May*, 1853. *Ibid.*

16. The act of *January* 16, 1849, giving exclusive original jurisdiction of assaults and batteries to justices of the peace in *Delaware* county, took effect from its passage.—*Smith* v. *The State*, 500

17. The R. S. 1852 were not in force in *March*, 1853.—*Ledley* v. *The State*, 580

18. The internal improvement act of 1836, except so far as it conflicts with the acts transferring the various public works, has not been repealed; and the Supreme Court has constantly regarded it as entering into and forming a part of the various acts conveying away, for construction, the public works, so far as consistent with those acts.—*Null et al.* v. *The White Water, &c., Canal Co.*, 431

19. The act of *January* 16, 1849, giving exclusive original jurisdiction of assaults and batteries to justices of the peace in *Delaware* county, took effect from its passage.—*Smith* v. *The State*, 500

20. The meaning of the act entitled "an act to amend article 5, chapter 28, of the Revised Statutes of 1843," approved *January* 21, 1850, is, that in the distribution of the surplus of the personal estate of a deceased husband, after the payment of debts, there shall be given to the widow, where there are no heirs lineally descended, the amount of dowry which she brought to the husband, if the surplus is sufficient for that purpose; and where the surplus exceeds that amount, she shall receive such amount and half of the residue: but where she brought no dowry, she shall have half of such surplus.—*Carothers et ux.* v. *Little et al.*, 571

21. Section 3 of chapter 71 of the R. S. 1843, does not make it penal to issue or put in circulation as a circulating medium, or substitute for bank notes, bills containing a promise to pay a sum of money in bank notes.—*The State* v. *Watson*, 595

22. The law in relation to exceptions in a statute is, that if the exception be contained in a subsequent clause or statute, it is matter of defence, and need not be negatived in the information; but if it be closely connected with the enacting clause, or if it be in the same clause of the act which creates an offence, it is necessary to show by negative averment that the defendant is not within the exception.—*Brutton* v. *The State*, 601

23. *Jennings* county is one in which by the act of *January* 16, 1849, exclusive original jurisdiction, in cases of assault and battery, is vested in justices of the peace.—*Sumpter* v. *The State*, 605

24. The R. S. 1852 did not take effect till the 6th of *May*, 1853.—*The State* v. *Kiger*, 621

STAY OF EXECUTION.

See ALIMONY, 2, 3. JUDGMENT, 12, 13.

A promissory note was made payable, in terms, without the benefit of the stay of execution. Suit was brought upon the note and the court rendered judgment for the plaintiff, and that the defendant should have no stay of execution. *Held*, that so much of the judgment as prohibited the stay of execution was erroneous.—*McLane et al.* v. *Elmer*, 239

STEAMBOAT.

See NEGLIGENCE.

SUBSTITUTION.

See JUDGMENT, 1.

A junior mortgagee who, to protect his own interest, purchases the mortgaged premises at a sale upon foreclosure of the first mortgage, is entitled to be subrogated to all the rights and equities of the first mortgagee.—*Benton* v. *Shreeve et al.*, 66

SUMMONS.

1. The R. S. 1843 authorized the service of a summons by leaving a copy at the defendant's usual place of residence.—*Kelly* v. *Mason*, 618
2. The statute did not contemplate that the seal should be copied. *Ibid.*
3. The date is not a material part of a summons. *Ibid.*
4. A defendant served with a summons by leaving a copy at his residence, cannot obtain a continuance simply because he was absent when the copy was left, and received no notice of the suit till the day before the commencement of the Court. *Ibid.*

SUNDAY.

The making of a promissory note on *Sunday* is common labor within the meaning of s. 123, c. 53, R. S. 1843.—*Reynolds* v. *Stevenson*, 619

SUPERVISOR.

1. A supervisor, for the purpose of keeping the highways of his district in order, might, under the R. S. 1843, enter upon any lands adjoining or near to any highway in his district, and thereupon construct such ditches, &c., as might be necessary for the construction, repair, &c., of such highway. —*Conwell* v. *Emrie*, 209
2. When the supervisor acts without the scope of his authority, and private injury is thereby sustained, the law will not protect him. *Ibid.*
3. A person acting as supervisor was sued in case for constructing a culvert across a public road in his district in such a manner as to convey water from a hill-side into and upon the plaintiff's tan-yard, to his injury, &c. The plaintiff having proved the construction of the culvert by the defendant, in the manner charged, &c., *held*, that the defendant, in order to relieve himself from liability, was bound to show that the culvert was necessary for the construction, repair, or preservation of the highway, and was constructed at the proper place. *Ibid.*

SUPREME COURT.

1. It appeared by the briefs of the counsel in a cause, that judgment had been rendered for more than was due, in order to give the Supreme Court jurisdiction and extract an opinion on certain points supposed to be at issue in the case; and the character of the proceedings, as shown by the record, indicated that such was the fact. The Supreme Court affirmed the judgment, without investigating the grounds on which it was rendered.—*Hotchkiss et al.* v. *Jones*, 260
2. Motion to reinstate a cause upon the docket of the Supreme Court. The cause having been continued for two terms successively under the general order, was, at the next term, regularly called for trial, and, the plaintiffs failing to appear, was dismissed, at the instance of the defendants, under rule 19, governing the practice of the Court, which prescribes that "if, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed," &c. At a subsequent day of the same term, on motion of the plaintiffs' counsel, a rule was granted and served on the defendant's counsel, to show cause why the case should not be reinstated, &c. The only ground for reinstating the cause, was contained in an affidavit of the plaintiffs' counsel, alleging that he was necessarily absent on the calling of the cause; that it was dismissed for want of prosecution; and that he believed there were merits in the cause, and that justice required its reinstatement. *Held*, that no sufficient reason was shown for granting the motion.—*Hood et al.* v. *Dinwiddie et al.* 294

3. Where, however, at the calling and dismissal of a cause, the plaintiff is temporarily out of the court-room, but returns immediately and asks its reinstatement, the Court would direct the entry of dismission to be stricken out. *Ibid.*

4. The Supreme Court has no jurisdiction under s. 119, 2 vol. R. S. 1852, to correct an alleged error in the finding of the Court, in a criminal cause, where the defendant has been acquitted.—*The State* v. *Yount*, 653

SURETY OF THE PEACE.

An affidavit for surety of the peace alleged that the complainant verily believed and actually feared, &c., that *A. B.* would kill him, or do him great bodily injury, or procure others to do so, &c. *Held*, that the charge was bad for being in the alternative.—*Steele* v. *The State*, 561

SURPLUS REVENUE.

See DEPOSIT, 2. RELATOR.

TAXES.

See TREASURER.

1. The statute which exempts persons or property from taxation, is to be construed strictly.—*Orr* v. *Baker*, 86

2. The statute which exempts from taxation the lands whereupon every building erected for religious worship is situate, not exceeding ten acres, was not intended to include any part of the land which is diverted to secular uses for gain. *Ibid.*

3. A tract of land was listed twice for taxes of the year 1827—once as first-class, and once as second class land. The clerk, in transcribing from the assessment-roll, carried out the tract as first-class land. The law of 1825, and the act of which it is amendatory, made it the duty of the clerk to carry out the assessment into the duplicate; but there was no provision in a case where the land was thus listed twice, which listing should be carried out. The land was afterwards sold for the non-payment of the taxes of 1827. *Held*, that the sale could not be supported.—*Barnes* v. *Doe d Pelton*, 132

4. The law in relation to the sale of land for the non-payment of taxes is construed strictly. *Ibid.*

5. The possession of land under a deed given upon a sale for taxes, is adverse, though the title under the deed may be invalid.—*Hearick et al.* v. *Doe d. Dunn et al.*, 164.

6. Under the R. S. 1824, a collector's deed upon a sale for taxes was *prima facie* evidence that the collector had done his duty in relation to the sale. *Ibid.*

TENANT IN COMMON.

See WIDOW.

TENDER.

See SHERIFF, 3, 4.

A tender of money in a handkerchief, with a statement of the amount and kind, is a sufficient tender.—*Davis et al.* v. *Stone-street*, 101

TERRE-HAUTE DRAWBRIDGE COMPANY.

1. The charter of the *Terre-Haute Drawbridge Company* does not authorize the company to create any obstruction to the navigation of the *Wabash* river in constructing their bridge.—*The Terre-Haute Drawbridge Company* v. *Halliday et al.*, 36

2. By an obstruction is meant such an impediment to the navigation, that boats in passing along the stream could not, by the use of skill and care, avoid being injured. *Ibid.*

TIME.

See CONTRACT, 13.

TITLE-BOND.

See VENDOR AND PURCHASER, 4.

TRANSCRIPT.

See JURISDICTION. PROMISSORY NOTE, 9.

TREASURER.

County treasurers were not, under the R. S. 1843, entitled to a per cent. for paying out that part of the revenue collected on the tax duplicate.—*Woollen* v. *The Board of Commissioners of Jefferson Co.*, 331

TREATY.

See VENDOR AND PURCHASER, 6.

TRESPASS.

See PLEADING, 17, 29.

TROVER.

In trover, upon the general issue, the plaintiff must recover upon the strength of his own title and right of possession, and not

on the want of title of his adversary.—*Bricker* v. *Hughes*, 146

TRUST.

See CHANCERY, 5.

TRUST ESTATE.

See EXECUTION, 6.

U.

UMPIRE.

See ARBITRATION, 10.

USAGE.

See CRIMINAL LAW, 1.

1. A usage of trade may be proved to aid, in a case of doubt, in construing a contract or determining upon the manner of discharging some duty or performing some act; but to give it any controlling effect it must be a long-continued, uniform, and generally known usage; and it must relate to matters of fact and not to a common belief as to what is the law.—*Cox et al.* v. *O'Riley et al.*, 368

2. A usage repugnant to well-established rules of law is not, in any case, admissible in evidence. *Ibid.*

USURY.

See INDICTMENT, 5.

1. Usury may be given in evidence under the general issue.—*Starr* v. *Lowe et al.*, 192

2. *A.* being indebted to *B.* for the balance of a note then due, and desiring an extension of credit, went with *B.* to *C.*, to whom *B.* then sold the note at a discount of 10 per cent., upon an agreement that a credit of a year was to be extended to *A.* upon the note. *A.*, at the same time, to indemnify *B.*, executed to *B.* a note, in form of a due bill, for the amount of the discount upon the first note. *Held*, that the latter note was void, as being given entirely upon a usurious consideration. *Ibid.*

3. Section 29, c. 31, R. S. 1843, is retrospective, and revives contracts which were, by the previous act, void for usury.—*Reed et al.* v. *Coale, Administrator*, 283

4. But the payee of a usurious note, under the law of 1843 can only recover the principal, without interest, and if any interest has been paid, it is deducted from the principal, and judgment rendered for the residue; and the defendant recovers his costs. *Ibid.*

5. To constitute usury, two things are necessary: 1. A loan, and 2. The taking of more interest than the law allows; and where these facts are shown to exist, the law pronounces the intent to have been corrupt. *Ibid.*

6. In a civil case, evidence is not admissible to show that the party contracting for usurious interest had no corrupt purpose in taking it. *Ibid.*

V.

VARIANCE.

See EVIDENCE, 1. JUDGMENT, 4.

VENDITIONI EXPONAS.

See EXECUTION, 1, 2.

VENDOR AND PURCHASER.

See ADMINISTRATOR'S SALE, 1, 2. ADVERSE POSSESSION. CERTIFICATE FOR CANAL LAND, 2. CHANCERY, 5. CONVEYANCE. COVENANT, 1 to 6. EXECUTION, 6. FRAUDULENT CONVEYANCE. JUDGMENT, 1. NOTICE. PLEADING, 8, 10, 14, 27, 30. PROMISSORY NOTE, 32. SEDUCTION. SHERIFF, 4, 5.

1. *A.* sold and conveyed to *B.* and *C.* a tract of land and took their note for part of the purchase-money. Afterwards, and before the note became due, he sent an agent to collect it. Upon the proposal of *B.*, the agent agreed to take the individual note of *B.*, with an extension of the time of payment, for a part of his half of the note, upon his paying in hand the residue of such half. The money was thus paid and the note taken, and the agent thereupon entered a credit on the original note for one-half thereof. The land afterwards passed into the hands of *D.*, an innocent purchaser, for a valuable consideration, without notice of the circumstances under which the credit was made, or the individual note of *B.* executed. *A.* received the note of *B.*, acquiesced for several years in the arrangement made by his agent, and did not disapprove thereof; but afterwards filed his bill to enforce his lien, as a vendor, against the land in the hands of *D.*, for the non-payment of the individual note of *B.* *Held*, that as to *D.*, at least, *A.* must be held to have ratified the act of his agent, and that the credit entered on the original note by the agent must be treated as a payment, and that the individual note of *B.* must be

regarded simply as given for money loaned.—*McCarty et al.* v. *Pruett*, 226

2. A vendor's lien for unpaid purchase-money follows the land in the hands of a purchaser from his vendee with notice that part of the purchase-money is unpaid; but the burden of proof is on the vendor. *Ibid.*

3. It is the duty of a sheriff on a sale of land upon execution, to make and tender a deed to the purchaser, and the latter is not bound to part with his money till the deed is tendered.—*The State* v. *Lines*, 351

4. *A.* being a part-owner of a tract of land, conveyed it to *B.*, to be sold by him at public auction with the residue of the tract. *A.*, at the sale, bought the whole tract, and received a title-bond from *B.* therefor. *Held*, that *A.* acquired the same title which a stranger would have acquired. *Held*, also, that his interest being that of the obligee of a title-bond, was not subject to execution.—*The State Bank et al.* v. *Macy et al.*, 362

5. *A.* being seized of the undivided three-fourths, and his wife of the undivided one-fourth, of a tract of land, they conveyed it to *B.* The latter gave his notes for the purchase-money payable to *A.*, and a mortgage to *A.* to secure the payment of the notes. *B.* also executed a bond, whereby he bound himself to re-convey the land to *A.* if he failed to make the first payment,—*A.* having the right, in case of such failure, to cancel the contract and take back the land to himself. *B.* having failed to make the first payment, and become a bankrupt, *A.* filed a bill against his assignee in bankruptcy, &c., setting up the contract and praying for a re-conveyance of the land, and the Court rendered a decree that the assignee should convey the land to *A.*, which he did. *Held*, that upon failure to make the first payment, the property, by virtue of the bond, vested in equity in *A.*, and not in *A.* and wife according to their original interests therein.—*Speakman et al.* v. *Speakman et al.*, 420

6. By an Indian treaty made in 1832, the *United States* agreed to grant to one *T.*, an Indian, a section of land, which should be conveyed to him by patent. The land was to be selected under the direction of the President. The agent appointed by the President reported, on the 20th of *January*, 1836, that he had selected the section, a part of which was the land in question, and the President approved the report, but no patent ever issued to *T.* One *H.* had, in 1832, located on the land in question, made improvements and continued to occupy it, and, in 1841, obtained a patent for the same under a pre-emption right. *Held*, that the treaty did not operate as a grant *in præsenti*, but only as a contract for a future conveyance by patent. *Held*, also, that *H.*'s title was complete.—*Verden* v. *Coleman et al.*, 457

7. Where land is sold by metes and bounds, and is estimated to contain a specific quantity, or is for such quantity "more or less," and a gross sum is paid for the entire tract, the general rule is that the vendee will not be entitled to an abatement in price should the number of acres fall short of the estimated quantity.—*Cravens* v. *Kiser*, 512

8. This rule is not, however, applicable where there is any fraud or concealment on the part of the vendor. *Ibid.*

9. Where, through the fraud of the vendor, the purchaser gets less than the estimated number of acres, the sum to be deducted by reason thereof is the value of the deficiency. *Ibid.*

10. *A.* conveyed his farm to *B.*, his son, by deed, for the nominal consideration of 1 dollar. At the same time, *B.* executed a bond to *A.*, in which, after reciting the conveyance, in consideration thereof, he bound himself to cultivate the farm in a husbandlike manner, and to deliver to *A.*, during his life, one-third of the produce, &c. *B.* having failed to deliver the produce as stipulated, *A.* filed his bill to cancel the deed and for an account, &c. *B.* proved upon the hearing the payment of a small amount of money upon the land, but admitted in his answer that the principal consideration was the execution of the bond.
Held, that the deed and bond were but parts of one contract, and were to be treated as a single instrument.
Held, also, that *B.* held the land upon a condition subsequent, that he would, in all things, substantially comply with his covenant.
Held, also, that *B.*'s failure to perform the covenant was a breach of that condition, and worked a forfeiture of the estate.
Held, also, that chancery might properly interfere to set aside the conveyance.
Held, also, that upon setting aside the conveyance, an account should be taken, and *B.* should be allowed for the money consideration paid by him, with interest, and for his improvements, and all rents paid; and that he should be charged with the rents of the whole farm, including the part cleared by him, from the time he went into possession.—*Leach* v. *Leach* 628

VENUE.

See INDICTMENT, 3, 5, 6. PROBATE COURT.

1. It is competent for the Circuit Court to which a change of venue has been granted to change the venue back, upon a proper application, to the same Court that granted it.—*Clark* v. *The State*, 268

2. A party by consenting to a change of venue and appearing to the action in the Court to which it is removed, waives his right to complain of any irregularity in the manner of the change. *Ibid.*

3. Where a change of venue was taken, under the R. S. 1843, in a criminal cause, the county from which the change was taken was liable to the clerk for his fees in making out a transcript of the proceedings and forwarding the same to the county to which the change was taken, and to the clerk and sheriff of the latter county for their fees in the case, irrespective of the conviction or acquittal of the defendant.—*In the matter of Taylor, ex parte*, 479

4. It was the duty of the Court to which the change was taken, under the R. S. 1843, upon a proper motion, to audit and allow such fees. *Ibid.*

VERDICT.

See CRIMINAL LAW, 2. INSTRUCTIONS, 23. JUDGMENT, 15. PRACTICE, 4, 9, 27.

1. The objection that a verdict is contrary to evidence meets with little favor in the Courts, if there is any evidence from which a jury might fairly infer the fact ascertained by their verdict; but where the evidence in the record is not sufficient to support the verdict, it ought not to be sustained.—*Goodwin* v. *Blackley et al.*, 438

2. Where a series of long and complicated dealings is involved in a trial, the verdict of the jury, unless grosaly unjust or founded in palpable mistake, will not be disturbed by the Supreme Court, notwithstanding the plaintiff may have remitted a part of the verdict.—*Watson* v. *Allen*, 537

3. Where, on a careful review of the evidence given in a cause, the conclusions of the Supreme Court would differ widely from those of the jury, it is still deemed safer to defer to their decision. *Ibid.*

4. The finding of the Court, sitting as a jury, is conclusive in the absence of a clear preponderance of evidence.—*Slevin et al.* v. *Morrow et al.*, 425

5. The finding of the Circuit Court, sitting as a jury, upon a matter of fact, will not be disturbed, where the evidence is conflicting.—*Doe d. Wentworth et al.* v. *Goodwin*, 508

6. The verdict of a jury will not be disturbed, unless there is a clear and manifest preponderance of evidence against it.—*The State* v. *Cheek et al.*, 543

7. The Supreme Court will not disturb the finding of a jury where the evidence is conflicting.—*Rush* v. *McCoskry et al.*, 588

W.

WABASH AND ERIE CANAL.

By the 5th specification of the 8th section of the act of 1846 "to provide for the funded debt of the state of *Indiana* and for the completion of the *Wabash* and *Erie* canal to *Evansville*," it was enacted that from and after the first of *January*, 1853, an account of the tolls and revenues of, and the expenditures on, that portion of said canal between *Lafayette*, inclusive, and the *Ohio* state line, should be kept separate and apart from a like account of that portion between *Lafayette*, exclusive, and *Evansville*; and from that time the tolls and revenues derived from the first-named portion, after defraying expenses, &c., should first be applied to make the full interest of five per cent. on the certificates of stock which might be issued for bonds then outstanding and known as *Wabash* and *Erie* canal bonds. The interest was payable on the first days of *January* and *July*. By the tenth section of the supplemental act of 1847, the scale of distribution above set forth was changed, but there was a proviso saving the just rights of the holders of bonds outstanding and known as the *Wabash* and *Erie* canal bonds as provided for in said eighth section. The relator being the owner and holder of 56,712 dollars of the stock of said canal issued in place of principal and interest of the original bonds of said canal surrendered to the state for cancellation in exchange for said stocks, pursuant to the act and supplemental act above named, demanded of the trustees the interest on said stock from the first of *January*, 1853, to the first of *July* of that year, between which periods the trustees kept an account of the tolls and revenues of, and the expenditures on, that part of the canal between the *Ohio* state line and *Lafayette*, which amounted to more than enough, after defraying necessary expenses, repairs and outlays, to pay 5 per cent. interest per annum on the certificates of stock issued on account of the

original bonds surrendered and known as *Wabash* and *Erie* canal bonds. A large sum, however, was necessary to finish the canal from *Lafayette* to *Evansville*, and for the work done the trustees were indebted; and, besides the stocks issued on the surrender of the original *Wabash* and *Erie* canal bonds, various other stocks were issued under the act referred to.

Held, that the trustees should have paid the interest demanded, and that, having refused, a *mandamus* would lie to compel them to pay it.—*The State* v. *The Board of Trustees of the W. and E. Canal*, 495

WARRANT OF ATTORNEY.

See JUDGMENT, 4 to 7.

WARRANTY.

A. in an exchange of horses with *B.* was asked by *B.* what was the matter of his, *A.'s*, horse, the horse appearing to be diseased. *A.* replied that the horse "had the distemper a little." *Held*, that the statement was in effect a representation that the horse was not otherwise diseased.—*Hull* v. *Kirkpatrick*, 637

WHARFINGER.

1. Wharfingers are not, like common carriers, answerable for all goods that may be intrusted to them, not lost by the act of God or the public enemy; but are only responsible for losses happening through failure to exercise reasonable and ordinary care and diligence; and they are, in this particular, in the same category with warehousemen.—*Cox* v. *O'Riley et al.*, 368

2. In a suit against a wharfinger for the value of goods received by him as such and not delivered to the consignee, he must first prove that he has not the possession of the goods, to allow evidence that he exercised reasonable and ordinary diligence in preserving them. *Ibid.*

3. It is the duty of the wharfinger to give direct and reasonably prompt notice to the consignee of the arrival of the goods, and he will not be excused from the consequences of a neglect to give the notice, by the simple proof of his having notified a person in the employ of the consignee of the arrival, or by the consignee's having heard a rumor that the goods were in the wharfinger's possession. *Ibid.*

WHITE WATER VALLEY CANAL COMPANY.

H. having on the 13th of *April*, 1846, made a special deposit in the office of the *White Water Valley Canal Company* of 2,500 dollars in the small certificates of stock of the company, the treasurer gave him a certificate signed by himself and attested by the secretary, stating the fact, and that the certificate would draw interest for two years from that date, at 6 per cent.; but if the deposit should be removed and the interest demanded before the expiration of that time, the interest might be paid, at the option of the company, in like funds with those deposited. One-half of the deposit was withdrawn at different periods before, and the residue after, the expiration of the two years. After the withdrawal of the entire deposit, the secretary computed the interest which had accrued upon it, and entered it to *H.'s* credit in his account on their books, and afterwards, upon demand being made, refused to pay it. These transactions took place in the office, and through the regular and acknowledged officers, of the company.

Held, that the contingency upon which the company had an option to pay the interest in money or stock, never occurred.

But, *held*, that admitting that the withdrawal of the one-half of the deposit within the two years gave the company the option to pay the interest on that half in cash or certificates, still that was an option they were bound to exercise within a reasonable time.

Held, also, that such reasonable time was when *H.* demanded the interest after the expiration of the two years.

Held, also, that the computation of the interest due and the entering of the same by the secretary on the company's books, together with the fact that there was no refusal to pay the interest on the deposit when demanded, amounted to a new contract, founded upon a good consideration, to pay the sum found by the secretary to be due.

Held, also, that the company were bound, under the circumstances, by the acts of their officers.—*The White Water, &c., Canal Co.* v. *Hawkins*, 474

WIDOW.

See STATUTES, 20.

Under the R. S. 1843, the widow of an intestate was a tenant in common with the heirs until objection was made.—*The Centreville, &c., Railroad Co.* v *Jarrett et al.*, 213

WILL.

See PRACTICE, 20.

1. To aid courts in interpreting wills, the law permits, in every case in which it may be necessary, that parol evidence may be given of the circumstances of the testator, and of his family and affairs, in order that the Court, standing, as it were, in the situation of the testator when making his will, may, with greater certainty, arrive at his intention in giving a construction to the language employed by him to express it.—*Stevenson et ux.* v. *Druley*, 519

2. A testator having a son and grandson, his only presumptive heirs, devised a part of his real estate to the grandson, as follows: I will and bequeath to *A. B.* the following described real estate (describing it)—the said *A. B.* to have possession of the same, except the widow's dower, by his paying said widow one-fourth part for rent until he becomes of age, and no longer. In disseizin by the heir of the son against the heirs of *A. B.* for the land, evidence was admitted tending to show that the property mentioned in and disposed of by the will, was all the testator owned; that he had previously conveyed to his said son, to whom by his will he gave 5 dollars, adding that he had received his part before, a quantity of land worth as much if not more than that given to *A. B.* *Held*, in the light of this evidence, that the testator intended to give *A. B.* a fee simple. *Ibid.*

3. In doubtful cases the law of inheritance prevails against the terms of the will. *Ibid.*

WITNESS.

See BASTARDY, 1, 2. PRACTICE, 24.

1. In an action against a sheriff for failing to deliver to his successor in office an execution placed in his hands, the successor is not a competent witness to prove that it was not delivered to him.—*Hughes* v. *McClelland et al.*, 92

2. The verdict of a jury against a person indicted for burglary, does not render him infamous, and, therefore, incompetent as a witness; but it is the judgment of the Court which does so.—*Dawley* v. *The State*, 128

3. A witness may be permitted to refresh his memory by referring to a memorandum written by himself or another, at or near the time of the occurrence to which he testifies; but he can then only testify from his recollection.—*Clark* v. *The State*, 156

4. The fact that the memorandum was made out while the facts were fresh in his memory, and that he then knew that the particulars contained in the memorandum were correctly stated, is not sufficient. *Ibid.*

5. Where the statement of a witness is relevant to the issue, evidence of a contradictory statement made by him out of Court, is admissible, to impeach his testimony.—*Lawrence* v. *Lanning*, 194

6. To render a witness incompetent on the ground of interest, he must be interested in the event of the suit.—*Strange et al.* v. *Donohue*, 327

7. A release executed by a person to render him competent as a witness need not be delivered to the releasee, but may be deposited in Court for his use.—*The Madison Insurance Co.* v. *Lostutter*, 558

8. The interest of a witness in the question involved in a suit, goes to his credibility merely, and not to his competency. *Ibid.*

9. In a suit by one of several joint owners of a cargo upon a policy of insurance, the other joint owners, to render themselves competent as witnesses, executed to the plaintiff a release of all the interest they might or could have in any judgment that might be recovered in the suit. *Held*, that the instrument was not defective for not purporting to release the insurer from all claim by the releasors for any loss of the property insured. *Ibid.*

10. Where one of several joint owners effects an insurance of his interest in a cargo, the other joint owners are competent witnesses for him in a suit upon the policy. *Ibid.*

11. The refusal of the Circuit Court in a criminal case to hear more than two witnesses to the same point, cannot be supported as a rule of decision. The leaning of the courts should be to allow as wide a latitude to the defence, in criminal cases, as is consistent with a proper dispatch of the public business.—*Gardner* v. *The State*, 632

12. But, in most instances, the number of witnesses that shall be heard on a single point is a matter resting in the discretion of the Court, and to bring it properly within the cognizance of the Supreme Court, the facts showing an abuse of that discretion must be presented in the record. *Ibid.*

WRIT OF ERROR.

Writs of error, by the R. S. 1843, lie only to final judgments and decrees.—*Bradley* v. *Bearss et al*, 186

END OF VOL. IV.

5084)26